Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID MILLER, Superintendent, Eastern Correctional Facility,

Petitioner,

—v.—

JOSE RODRIGUEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 17, 2006

QUESTIONS PRESENTED

1. Whether, at a criminal trial, when the general public properly has been excluded from the courtroom during the testimony of an undercover police officer in order to prevent his safety and effectiveness from being compromised, the Sixth Amendment right to a public trial ever requires that the defendant's relatives nonetheless be permitted to be remain in the courtroom during the officer's testimony.

2. Whether, at a criminal trial, when the general public properly has been excluded from the courtroom during the testimony of an undercover police officer in order to prevent his safety and effectiveness from being compromised, and when, as an alternative to the exclusion of the defendant's relatives from the courtroom, the trial court offers the defendant the option of having his relatives sit behind a screen to obstruct their view of the undercover officer, that option constitutes a reasonable alternative to closure that is consistent with the Sixth Amendment right to a public trial, even if the exclusion of the defendant's relatives would violate that right.

PARTIES TO THE PROCEEDING

The petitioner in this Court is David Miller, the Superintendent of the Eastern Correctional Facility, which is the state prison where Jose Rodriguez is incarcerated. Mr. Miller is represented in this federal habeas corpus proceeding by Kings County District Attorney Charles J. Hynes, by agreement with the Attorney General of the State of New York. The respondent in this Court is Jose Rodriguez, who was convicted of narcotics offenses in New York State court and filed the federal habeas corpus petition that is the subject of this litigation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

David Miller, Superintendent of Eastern Correctional Facility in New York, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit that reversed a judgment of the United States District Court for the Eastern District of New York (Block, J.) and remanded the case to that court, with a direction to grant Jose Rodriguez's petition for a writ of habeas corpus, conditioned upon the State's right to re-try Rodriguez within ninety days. The district court had denied the petition for a writ of habeas corpus, holding that the exclusion of Rodriguez's mother and brother from the courtroom during the testimony of an active undercover police officer did not deprive Rodriguez of his Sixth Amendment right to a public trial.

Opinions Below

The citation of the opinion of the United States Court of Appeals for the Second Circuit is *Rodriguez v. Miller*, 439 F.3d 68 (2d Cir. 2006). The opinion of the United States District Court for the Eastern District of New York, *Rodriguez v. Miller*, No. 00-CV-3832 (E.D.N.Y. Nov. 24, 2004), is not officially reported, but is available on Lexis at 2004 U.S. Dist. LEXIS 23741 and on Westlaw at 2004 WL 3567978. A previous decision in this case by the court of appeals is *Rodriguez v. Miller*, 82 Fed. Appx. 715 (2d Cir. 2003). A previous decision by the district court, *Rodriguez v. Miller*, No. 00-CV-3832 (E.D.N.Y. Oct. 22, 2001), is available on Lexis at 2001 U.S. Dist. LEXIS 17659 and on Westlaw at 2001 WL 1301732. The citation of the

opinion of the New York Appellate Division is *People v. Rodriguez*, 258 A.D.2d 483, 685 N.Y.S.2d 252 (App. Div. 2d Dep't 1999). The oral decision of the state trial court on the State's motion to close the courtroom during the testimony of the undercover police officer is unreported. Each of the above decisions is reproduced in the Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 17, 2006 and amended on March 9, 2006. This petition for certiorari was filed within ninety days of February 17, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . .

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

28 United States Code § 2254:

> **State custody; remedies in Federal courts**
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation

of the Constitution or laws or treaties of the United States.

. . . .

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

STATEMENT OF THE CASE

Introduction

The defendant, Jose Rodriguez, was tried before a jury and convicted of selling cocaine to an undercover police officer on three occasions in 1994 in Brooklyn, New York. The principal witness against the defendant was the undercover officer.

Prior to the undercover officer's testimony, the State moved to close the courtroom for the duration of his testimony. The trial court conducted a hearing, at the conclusion of which the court granted the motion, ruling that the State had demonstrated that open-court testimony would jeopardize the undercover officer's safety and continued effectiveness. However, the court ruled that the defendant's mother and brother, whom the defendant sought to have exempted from the closure order, could remain in the courtroom, provided that the defendant agreed to their being seated behind a screen that would prevent them from visually observing the

officer. The defendant rejected the court's offer. On his direct appeal, the defendant did not challenge the propriety of the closure of the courtroom to the general public, but contended that his relatives should have been exempted from the closure order. A state appellate court rejected the defendant's contention. The appellate court also held that the trial court had offered the defendant a reasonable alternative to closure—the screen—with respect to his family.

The district court denied the defendant's petition for a writ of habeas corpus. The Second Circuit reversed, concluding that the state appellate court had unreasonably applied this Court's decision in *Waller v. Georgia*, 467 U.S. 39 (1984), in upholding the exclusion of the defendant's relatives from the courtroom during the undercover officer's testimony. According to the Second Circuit, the fact that the defendant's relatives lived in, or in close proximity to, the neighborhood in which the undercover officer worked was insufficient to warrant their exclusion from the courtroom, and, because there was no justification for their exclusion, there could be no justification for the court's conditioning their presence in the courtroom on their being seated behind a screen.

This case presents two related and important constitutional questions, each of which warrants this Court's consideration: (1) whether, in a case in which the general public is properly excluded from the courtroom for the protection of a prosecution witness, the Sixth Amendment nonetheless requires that the defendant's relatives be permitted to remain in the courtroom unless the prosecution can demonstrate with particularity that the relatives pose an actual threat to the witness, and (2) whether, if, with respect to the defendant's relatives, the trial court offers the defendant an alternative to

closure that is reasonable—such as a screen—the State nevertheless must fully satisfy the *Waller* test, which governs closures of the courtroom.

The Motion to Seal the Courtroom

During the defendant's trial, the State moved to have the courtroom closed to the public during the testimony of the undercover police officer. The trial court conducted a hearing on the State's motion.

A. The Facts Adduced at the Closure Hearing

The undercover police officer testified at the closure hearing that, as of the time of the hearing, he had been an undercover police officer for approximately two and one-half years. During that time he had been involved in both "buy and bust" operations and long-term investigations.[1] The officer was involved in active, long-term narcotics investigations in the Bushwick area of Brooklyn—the neighborhood in which the transactions underlying the instant case had occurred—and he had "definite" plans to return to the area of Bushwick in which the transactions in this case occurred. In the course of his undercover police work, the officer had received numerous threats, many of which had come from the targets of a major case in the Bushwick area (Trial Transcript at 562-64, 567-68; *see* Appendix ["App."] at 3a, 18a).

The undercover officer had open cases pending in the Kings County (Brooklyn) trial court building, and he had "lost subjects," *i.e.*, people "who we wanted to apprehend and we can't find." There was at least one person

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[1] A "buy and bust" operation is one in which an undercover officer purchases narcotics from a seller who is then arrested, usually within a few minutes, by other members of the undercover officer's team.

in Bushwick, who was still out on the streets, who had threatened the officer (Trial Transcript at 563, 575; *see* App. at 3a, 18a).

The undercover officer had never testified in open court. On the day of his testimony in this case, he had been escorted into the courthouse through the rear entrance and had come up to the courtroom via the stairwell (Trial Transcript at 565; *see* App. at 3a).

The officer testified that he feared having his identity revealed to the relatives of the defendant in this case: "[I]f any of the immediate subject's family, relatives or friends see me, they'll be able to know I am a police officer and go back and spread the word around." The defendant's relatives might tell "people in the neighborhood that the defendant knows" that the officer was an undercover officer. The officer did not know specifically who those people in the neighborhood were to whom the defendant's relatives might reveal his identity, and he stated that although he feared the defendant's family, he did not know anyone in the defendant's family (Trial Transcript at 565, 569-70; *see* App. at 3a-4a, 18a).

B. The Arguments of Counsel and the Court's Decision

Following the officer's hearing testimony, the prosecutor requested that the courtroom be sealed during the officer's trial testimony. The prosecutor noted that the officer would be returning to the Bushwick area, where he had been threatened, and that if the officer's identity were revealed in court, "it could get back to the Bushwick area . . . given the fact that the relatives of the defendant will be in the courtroom if it is not sealed" (App. at 54a).

The defendant's attorney initially argued that there was no basis for closing the courtroom (App. at 54a-55a). The court disagreed, stating, "He's going back to the neighborhood . . . , he's still working in the neighborhood, lost subjects, fear for personal safety. It's well founded, it would seem" (App. at 55a).

Defense counsel then stated that even if the court were inclined to close the courtroom to the general public, there was "no real reason" to exclude the defendant's family from the courtroom (App. at 57a). However, defense counsel did not attempt to refute the testimony of the undercover officer, and the corresponding argument of the prosecutor, that if any of the defendant's family members were to see the undercover officer in court, they might reveal to people in the Bushwick neighborhood that he was a police officer. Defense counsel did not assert, for example, that the defendant's family did *not* live in the area to which the undercover officer would be returning.

The court asked defense counsel which members of the defendant's family were planning to attend the trial. Defense counsel said that "possibly" the defendant's mother might attend (App. at 57a). The court asked the prosecutor for his position on whether the defendant's mother should be allowed in, should she appear. The prosecutor opposed her being allowed to attend, stating:

> [T]his is unlike a buy and bust, this is unlike a simple narcotics case. This man is literally facing, if convicted on all counts, 125 years, life in prison. . . .
>
> . . . [I]t's clear that the undercover's worries are that if one family member knows, even if it's not the mother. If she tells somebody and this undercover will be testifying back and forth on several

> days in this building and be in the area, she can point him out to somebody. There is a danger.
>
> I don't know if it's going to happen or not going to happen. There is always a danger. The undercover's life in a case such as this is in jeopardy.

(App. at 57a-58a).

On the following day, the defendant's mother and brother came to the courtroom and sought to attend the trial. The court reiterated that the evidence adduced at the closure hearing was sufficient to warrant closure of the courtroom to the general public during the undercover officer's testimony (App. at 60a). Concerning the defendant's mother and brother, the court ruled that it would permit them to attend, but that it would set up a screen behind which they would have to sit. Thus, the jury and the defendant would be able to observe the witness, but the spectators' view of the witness would be obstructed (App. at 60a).

Defense counsel objected, arguing that setting up a screen would substantially prejudice the defendant by causing the jury to conclude that the witness was in danger (App. at 60a-61a). The court responded that it would give any reasonable curative instructions that the defense requested to ameliorate the concerns raised by defense counsel. Defense counsel insisted, however, that no instructions would be sufficient to ameliorate that prejudice, and that, if the court insisted on requiring the defendant's relatives to sit behind a screen, then counsel would ask the defendant's mother and brother to remain outside (App. at 61a). The court adhered to its ruling (App. at 61a-62a).

Thereafter, the trial resumed with the testimony of the undercover officer, during which the courtroom was sealed.

The Trial

At the trial, the State presented evidence that on October 12 and October 20, 1994, the defendant, acting in concert with another individual, Gaspar Cuevas, sold large quantities of cocaine to the undercover officer, and that on November 2 and November 17, 1994, the defendant, acting alone, sold additional large quantities of cocaine to the undercover officer. The defendant was arrested on November 28, 1994, and at the time of his arrest he possessed a large quantity of cocaine, which he had agreed to sell to the undercover officer that day.

The defendant was the sole defense witness at trial. He testified that the first two transactions (October 12 and October 20, 1994) were strictly between Cuevas and the undercover officer. However, the defendant admitted selling cocaine to the officer on November 2 and November 17, 1994.

The jury acquitted the defendant of the first two transactions, but found him guilty of the sale and possession of cocaine on November 2, November 17, and November 28, 1994. He was sentenced to a term of imprisonment of thirty years to life.

The State Appeal

On appeal to the New York Supreme Court, Appellate Division, Second Judicial Department, the defendant claimed that the exclusion of his relatives from the courtroom during the undercover officer's testimony deprived him of his Sixth Amendment right to a public trial. The Appellate Division rejected that claim and affirmed the judgment of conviction. The Appellate Division held that the trial court had properly exercised its discretion in closing the courtroom based on the testimony of the undercover officer at the closure hearing,

and that, in any event, the court had offered the defendant an alternative to closure (App. at 51a-52a). *People v. Rodriguez*, 258 A.D.2d 483, 685 N.Y.S.2d 252 (App. Div. 1999).

The defendant's application for leave to appeal to the New York Court of Appeals was denied. *People v. Rodriguez*, 93 N.Y.2d 978, 716 N.E.2d 1109, 695 N.Y.S.2d 64 (1999) (Ciparick, J.).

The Federal Court Proceedings

In June 2000, the defendant petitioned the United States District Court for the Eastern District of New York for a writ of habeas corpus. The defendant reiterated his claim that he was deprived of his right to a public trial by the state court's conditioning his relatives' attendance at trial upon their willingness to sit behind a screen that would have obstructed their view of the undercover officer. In opposing the petition, the State, citing 28 U.S.C. § 2254(d)(1), argued that the determination of the trial court to condition the attendance of the defendant's relatives at trial upon their willingness to sit behind a screen was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court.

By memorandum and order dated October 22, 2001, the district court denied the defendant's petition. After identifying *Waller v. Georgia*, 467 U.S. 39 (1984), as the controlling precedent, the district court held that even if the state court's decision were incorrect, "it certainly cannot be concluded that the decision was unreasonable under post-AEDPA review" (App. at 47a-50a).

By order dated November 18, 2003, the United States Court of Appeals for the Second Circuit vacated the district court's judgment and remanded the case to that

court for reconsideration in light of the Second Circuit's intervening decision in *Yung v. Walker*, 341 F.3d 104 (2d Cir. 2003). The Second Circuit directed the district court to "reconsider its prior holding in light of [the Second Circuit's] determination that it would be an unreasonable application of *Waller* to deny a family member's request to be present for trial if the exclusion of that particular family member is not necessary to promote the overriding interest that the court identified" (App. at 38a-39a). The Second Circuit also directed the district court to further examine whether the use of a screen was properly characterized as a partial closure or an alternative to closure, and whether, assuming the use of a screen was an alternative to closure, it was a reasonable alternative, given its potential prejudicial effect (App. at 39a).

Upon remand, the State submitted new evidence to the district court regarding where the defendant's relatives had been living at the time of the defendant's trial: the defendant's mother had been living in the Bushwick section of Brooklyn, within approximately ten to twelve blocks of the locations where sales by the defendant to the undercover officer occurred, and the defendant's brother had been living in a neighborhood adjacent to Bushwick, within approximately three blocks of one of the locations where a sale by the defendant to the undercover officer occurred (App. at 12a, 27a).

By decision dated November 24, 2004, the district court again denied the defendant's habeas corpus petition. The district court held that because the defendant's relatives lived in close geographic proximity to the undercover officer's area of operations, there was a likelihood that they would encounter him in the course of their daily activities. Additionally, the fact that the officer would be testifying over a number of days presented the possibility that the defendant's relatives would point

him out to others around the courthouse. Thus, the district court concluded, the exclusion of the defendant's relatives from the courtroom was necessary to promote the overriding interest in the officer's safety and effectiveness (App. at 28a-29a). The district court characterized the use of a screen as an alternative to closure, rather than a partial closure, and stated that the use of a screen was not *per se* unreasonable. However, the defendant, by categorically rejecting the alternative of the screen, had waived review of the reasonableness question—which, the district court concluded, would depend on the particulars of the screen used (App. at 29a-34a).

By opinion and judgment dated February 17, 2006, the Second Circuit reversed and remanded the case, with directions that the district court grant the writ, conditioned on the State's right to retrial within ninety days (App. at 2a, 15a). *Rodriguez v. Miller*, 439 F.3d 68 (2d Cir. 2006). The Second Circuit concluded that the mere proximity of the defendant's relatives to locations frequented by the undercover officer was insufficient to establish a threat to the officer's safety or efficacy. According to the Second Circuit, closure of the courtroom to the defendant's relatives could be justified only by evidence showing a likelihood of encounter between the relatives and the officer—a likelihood that could not be shown by geographical proximity alone—or else by evidence showing, for example, that the defendant's mother or brother was a dangerous person or was familiar with the defendant's criminal associates. Therefore, the Second Circuit held, the second prong of the *Waller* test, that the closure be no broader than necessary, was not satisfied (App. at 10a-14a). 439 F.3d at 74-75. The Second Circuit stated that it was unnecessary for it to determine whether a screen would constitute an alternative to closure or a partial closure in light of its ruling that "any type of closure excluding [the defendant's]

family was improper" (App. at 14a-15a). 439 F.3d at 75-76.

REASONS FOR GRANTING THE WRIT

This Court has not heard a case on the Sixth Amendment right to a public trial since *Waller v. Georgia*, 467 U.S. 39 (1984). The State is seeking a writ of certiorari because this case presents two important, controversial, and recurring questions concerning the right to a public trial, each of which was resolved incorrectly by the court of appeals and warrants review by this Court.

First, this Court has yet to decide whether, in a case in which the general public is properly excluded from the courtroom for the protection of a prosecution witness, the Sixth Amendment nonetheless requires that the defendant's relatives be permitted to remain in the courtroom unless the prosecution can demonstrate with particularity that the relatives pose a threat to the witness. The Second Circuit held that the state courts had unreasonably applied this Court's decision in *Waller v. Georgia* in concluding that the exclusion of the defendant's relatives from the courtroom was justified. The question of whether the right of a criminal defendant to the presence of his family in the courtroom during his trial outweighs the compelling interest of the State in the safety of its witnesses is an important and recurring one. This case presents this Court with an opportunity to clarify the circumstances, if any, under which the State must permit the defendant's family to remain in the courtroom, even when there is no dispute that the general public has properly been excluded for the safety of the witness.

Second, this Court has yet to provide guidance to the lower courts on what measures would constitute rea-

sonable alternatives to the closure of the courtroom, and whether, if the trial court offers the defendant a reasonable alternative to closure, the State nevertheless must otherwise fully satisfy the *Waller* test, which governs closures of the courtroom. The Second Circuit held that if the standards for closure of the courtroom are not met—as the Second Circuit concluded they were not, with respect to the defendant's relatives—then there can be no such thing as a reasonable alternative to closure. This case presents this Court with an opportunity to delineate the types of measures that would qualify as alternatives to closure and the showing that needs to be made before any alternative to closure may be implemented.

Because the Second Circuit's decision to grant habeas relief presents these two important issues, the State's petition for a writ of certiorari should be granted.

I. The Second Circuit's Decision Presents the Important, Recurring, and Unsettled Question of When, if Ever, a Criminal Defendant's Relatives Must Be Permitted to Remain in the Courtroom When the Courtroom Has Properly Been Closed to the General Public.

It has been some twenty-two years since this Court, in *Waller v. Georgia*, 467 U.S. 39 (1984), last decided a case under the Public Trial Clause of the Sixth Amendment. *Waller* recognized that the right to a public trial is not absolute, and set forth a four-part test for determining whether a motion to seal the courtroom may be granted over the defendant's objection: (1) the movant must advance an overriding interest likely to be prejudiced by open proceedings; (2) the closure must be no broader than necessary to protect that interest; (3) the court must consider reasonable alternatives to closing the

proceedings; and (4) the court must make findings adequate to support the closure. *Id.* at 48.

Since *Waller*, the lower courts have wrestled with numerous questions that were beyond the scope of that decision itself, such as: whether a more relaxed standard may apply when the closure of the courtroom is partial, rather than complete (*see, e.g., United States v. Sherlock*, 962 F.2d 1349, 1357 [9th Cir.], *cert. denied*, 506 U.S. 958 [1992]); whether it is the responsibility of the court or of the party opposing closure to suggest alternatives to closure (*see, e.g., Ayala v. Speckard*, 131 F.3d 62, 70-72 [2d Cir. 1997] [en banc], *cert. denied*, 524 U.S. 958 [1998]); and whether there are circumstances when a closure of the courtroom does not implicate the Sixth Amendment right to a public trial at all, as, for example, when the courtroom was closed only during the testimony of a relatively unimportant witness (*see, e.g., Brown v. Kuhlmann*, 142 F.3d 529, 541 [2d Cir. 1998]), or when the courtroom was closed only to a small number of spectators who sought to attend the trial (*see, e.g., Braun v. Powell*, 227 F.3d 908, 919 [7th Cir. 2000]).

But the most frequently litigated public trial issue since the decision in *Waller*—an issue closely related to the one presented by this case—concerns the set of circumstances that may permit the courtroom to be closed during the testimony of an undercover police officer. *See Ayala*, 131 F.3d at 80-81 n.4 (Parker, J., dissenting) (collecting cases); Rachel G. Piven-Kehrle, *Exclusion of Public From State Criminal Trial to Preserve Safety or Confidentiality of Undercover Police Officer Witness*, 100 A.L.R.5th 171, 176-83 (2002) (collecting cases). Among the courts that have addressed that issue with the greatest regularity, a consensus has emerged that where it is shown that the undercover officer will be returning, in an undercover capacity, to the same neighborhood in which he entered into the transactions that are the sub-

ject of the trial at which the officer is to testify, then the general public may be excluded from the courtroom. Under those circumstances, courts have held, the exclusion of the general public is necessary to ensure the State's overriding interests in the undercover officer's safety and effectiveness. *See, e.g., Brown v. Artuz*, 283 F.3d 492, 501-02 (2d Cir. 2002); *Nieblas v. Smith*, 204 F.3d 29, 33 (2d Cir. 2000); *People v. Ramos*, 90 N.Y.2d 490, 685 N.E.2d 492, 662 N.Y.S.2d 739, *cert. denied*, 522 U.S. 1002 (1997).

This case presents another frequently recurring issue concerning courtroom closure during the testimony of undercover officers, but an issue that is more controversial and unsettled: whether, although the courtroom has properly been closed to the general public, the defendant nevertheless is entitled to have members of his family attend the trial. *See, e.g., Smith v. Hollins*, No. 03-2250-pr (2d Cir. May 15, 2006); *Carson v. Fischer*, 421 F.3d 83 (2d Cir. 2005); *Sevencan v. Herbert*, 342 F.3d 69 (2d Cir. 2003), *cert. denied*, 540 U.S. 1197 (2004); *Yung v. Walker*, 341 F.3d 104 (2d Cir. 2003); *People v. Garcia*, 95 N.Y.2d 946, 750 N.E.2d 1049, 727 N.Y.S.2d 1 (2000); *People v. Nieves*, 90 N.Y.2d 426, 683 N.E.2d 764, 660 N.Y.S.2d 858 (1997); *People v. Gutierrez*, 86 N.Y.2d 817, 657 N.E.2d 491, 633 N.Y.S.2d 470 (1995); *People v. Watson*, No. 2004-08019, 2006 N.Y. App. Div. LEXIS 4740, 2006 WL 1085712 (App. Div. Apr. 25, 2006); *People v. Ward*, 6 A.D.3d 741, 774 N.Y.S.2d 604 (App. Div. 2004); *People v. Heslop*, 307 A.D.2d 975, 763 N.Y.S.2d 327 (App. Div. 2003); *People v. Richardson*, 296 A.D.2d 334, 744 N.Y.S.2d 407 (App. Div. 2002); *People v. Rivera*, 281 A.D.2d 496, 722 N.Y.S.2d 243 (App. Div. 2001).

Much of the controversy on this issue derives from dicta in this Court's decision in *In re Oliver*, 333 U.S. 257 (1948). In *Oliver*, this Court overturned the con-

viction for contempt of court of a defendant, who, in accordance with Michigan law, was tried by a judge in complete secrecy. This Court stated:

> In giving content to the constitutional and statutory commands that an accused be given a public trial, the state and federal courts have differed over what groups of spectators, if any, could properly be excluded from a criminal trial. But, unless in Michigan . . . , no court in this country has ever before held . . . that an accused can be tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches. *And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.*

Id. at 271 (emphasis added, footnotes omitted).

Some courts have understood the above-quoted observation in *Oliver* to mean that, even if the general public is properly excluded from the courtroom, the defendant nonetheless, as a general rule, has the right to have his family attend the trial. *See, e.g., Brown v. Kuhlmann*, 142 F.3d 529, 538 (2d Cir. 1998); *Tinsley v. United States*, 868 A.2d 867, 873 (D.C. 2005); *Nieves*, 90 N.Y.2d at 430, 683 N.E.2d at 766-67, 660 N.Y.S.2d at 860-61; *State v. Washington*, 142 Ohio App. 3d 268, 272, 755 N.E.2d 422, 425 (Ct. App. 2001). But this Court's statement in *Oliver* was made in the context of a case in which *everyone* was excluded from the courtroom without any justification whatsoever, and hence, this Court's statement does not compel the conclusion that, in a case, like this one, in which the general public is *properly* excluded from the courtroom for the safety of a witness, the State must make some additional showing to justify the exclusion of the defendant's family. *See Martin v.*

Bissonette, 118 F.3d 871, 875-76 (1st Cir. 1997) (rejecting claim that *Oliver* requires a heightened standard for exclusion of family members).

Rather, this case presents an opportunity for this Court to hold, consistent with the teachings of *Waller* and *Oliver*, that whenever, in order to protect the safety and effectiveness of an undercover police officer, closure of the courtroom to the general public is warranted, then closure of the courtroom to the defendant's relatives is also warranted. Indeed, in the case of an active undercover officer, the rationale for closing the courtroom to the general public applies with equal force, if not greater force, to the defendant's family.

The rationale for closing the courtroom to the public during the testimony of an undercover officer who will be returning in an undercover capacity to the defendant's neighborhood is that, if the courtroom were not sealed, then persons from that neighborhood who attended the trial might subsequently encounter the undercover officer in the neighborhood. These persons, if they were themselves in the narcotics business, might then avoid transactions with the undercover officer, or they might try to injure or kill the officer. Additionally, whether or not they were in the narcotics business themselves, these trial spectators might reveal the undercover officer's identity to other people in the neighborhood who were in the narcotics business, and these other people might avoid transacting business with the officer—rendering him ineffective—or might attack him.

Just as a member of the general public who is not in the narcotics business may compromise an undercover officer's safety or effectiveness by pointing him out to others in the neighborhood—and thus, may be excluded —so, too, a member of the defendant's family may compromise the officer's safety or effectiveness. *See*

Sevencan v. Herbert, 152 F. Supp. 2d 252, 265 (E.D.N.Y. 2001) (noting that a family member could pose a threat to an undercover officer by reporting a physical description of the officer to another individual with the ability and inclination to harm the officer), *aff'd*, 342 F.3d 69 (2d Cir. 2003), *cert. denied*, 540 U.S. 1197 (2004). Furthermore, the members of a defendant's family may be strongly motivated to compromise an undercover officer's safety or effectiveness. The undercover officer, after all, is the person who is responsible for their loved one's prosecution and likely incarceration, and the members of the defendant's family may well harbor anger toward the officer. Thus, the members of the defendant's family—even if not likely to be directly involved in attacks on the officer—are among the persons *most* likely to point him out to other parties with an interest in harming him or interfering with his undercover police work.

Of course, from a psychological standpoint, it usually will be more important to the defendant to have his family present during his trial than to have strangers present. But that does not mean that the Sixth Amendment requires that the family be treated with special solicitude. This Court has identified the underlying purposes of the Public Trial Clause as: ensuring that the courts do not become instruments of persecution; ensuring that the public sees that the defendant is dealt with fairly; keeping the participants in the proceeding keenly aware of their responsibilities and of the importance of their functions; encouraging witnesses to come forward; and discouraging perjury. *See Waller*, 467 U.S. at 46; *Oliver*, 333 U.S. at 269-71; *see also Brown v. Kuhlmann*, 142 F.3d at 535-37. However, there is nothing about the presence in the courtroom of a defendant's family *qua* family that particularly serves to advance any of these goals. Therefore, if the circumstances of a case justify closing

the courtroom to the general public, then there is nothing in the Public Trial Clause that suggests that the defendant nevertheless has a right to his family's presence in the courtroom.

In the courts below, however, the State did not argue that if the general public properly could be excluded from the courtroom, it necessarily followed that the defendant's family properly could be excluded as well, without the State having to show any additional facts particular to the defendant's relatives.[2] Instead, the State argued only that when the defendant's relatives live within, or in close proximity to, the neighborhood to which the officer will be returning in an undercover capacity, then the closure of the courtroom to his relatives does not violate the Sixth Amendment. *See, e.g., People v. Foxworth*, 305 A.D.2d 424, 759 N.Y.S.2d 173 (App. Div. 2003); *People v. Goris*, 305 A.D.2d 178, 758 N.Y.S.2d 65 (App. Div. 2003); *People v. Hargett*, 293 A.D.2d 757, 742 N.Y.S.2d 638 (App. Div. 2002); *People v. Blake*, 284 A.D.2d 339, 726 N.Y.S.2d 433 (App. Div. 2001); *People v. Powell*, 246 A.D.2d 494, 667 N.Y.S.2d 988 (App. Div. 1998); *People v. Feliciano*, 228 A.D.2d 519, 644 N.Y.S.2d 307 (App. Div. 1996) (all holding that

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[2] Prior case law in the Second Circuit precluded the State from taking that position. *See Sevencan v. Herbert*, 342 F.3d 69 (2d Cir. 2003), *cert. denied*, 540 U.S. 1197 (2004); *Vidal v. Williams*, 31 F.3d 67 (2d Cir. 1994). In an earlier opinion in *Sevencan*, the Second Circuit had held that a state trial court's decision to exclude a defendant's family, along with the general public, from a criminal trial would not be an unreasonable application of Supreme Court precedent, so long as the trial court, prior to conducting its *Waller* analysis, was made aware that there were members of the defendant's family whom he desired to have in attendance at the trial and the court otherwise reasonably applied the general requirements of *Waller*. *See Sevencan v. Herbert*, 316 F.3d 76, 86 (2d Cir. 2002). However, that holding was omitted when the opinion was subsequently amended. *See Sevencan*, 342 F.3d at 75 n.3.

family members who lived in area to which undercover officer would be returning could be excluded from courtroom).

In this case, it was assumed in the trial court, and it was established through documentary evidence in the federal district court, that the defendant's relatives indeed lived within, or in close proximity to, the neighborhood of the undercover officer's continuing operations. Hence, as the state courts and the district court held, once the defendant rejected the trial court's proposal of a screen, the defendant's family was properly excluded from the courtroom.

The Second Circuit nonetheless held that the state appellate court had unreasonably applied this Court's decision in *Waller* in upholding the exclusion of the defendant's family from the courtroom. *See* 28 U.S.C. § 2254(d)(1). The Second Circuit identified the error of the state courts (and the district court) in this case as their failure to require the State to establish *with particularity* that the defendant's mother or brother posed any threat to the undercover officer's safety or effectiveness. Such a threat, the Second Circuit suggested, could have been established by showing, for example, that the daily activities of the defendant's relatives in the Bushwick neighborhood made it likely that they would have encountered the undercover officer there (App. at 13a). 439 F.3d at 74-75.

However, nothing in *Waller* requires the State to establish that, if the courtroom is not closed, the defendant's relatives more likely than not will encounter the officer back in the neighborhood, or that the defendant's relatives more likely than not will compromise the officer's safety or effectiveness. The prosecution generally knows nothing about the background, character, or day-to-day activities of the various relatives of the defendant

who may seek to attend the trial during the undercover officer's testimony, and thus, is in no position to establish the inevitability of prejudice to its interests in protecting the officer's safety and effectiveness; it is sufficient for the prosecution to show a serious risk that these interests will be prejudiced. Such risk is made out by testimony that the officer will be returning in an undercover capacity to the neighborhood in which the defendant's relatives reside. *See, e.g., Goris*, 305 A.D.2d at 179, 758 N.Y.S.2d at 65; *Hargett*, 293 A.D.2d at 758, 742 N.Y.S.2d at 639. Presumably, persons who reside in a particular neighborhood engage in activities there on a daily basis, and it ought not be necessary for the State to call them as witnesses at a courtroom-closure hearing in an effort to establish that fact beyond peradventure.

This Court's decision in *Waller* did not announce anything approaching a bright-line rule. Rather, the decision propounded a four-part test of general applicability. As this Court stated in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), an evaluation of whether a state court's application of clearly established federal law was "unreasonable" under 28 U.S.C. § 2254(d)(1) "requires considering the rule's specificity," and "[t]he more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Id.* at 664. Given that the *Waller* test is stated in general terms and does not even require a stricter standard for closure of a courtroom to the defendant's relatives than for closure of the courtroom to the general public, the trial court's determination in this case—that the defendant's relatives would be excluded only if they declined the court's proposal of a screen—did not constitute an unreasonable application of *Waller*. Thus, the Second Circuit in effect substituted its own independent judgment for that of the state courts, rather than determining, as it is required to

do on habeas review of a state conviction, whether the judgment of the state courts was unreasonable.

Accordingly, this Court should grant a writ of certiorari to resolve the important Sixth Amendment question incorrectly decided by the court below.

II. The Second Circuit's Decision Presents the Important and Unsettled Question of What Measures May Constitute Reasonable Alternatives to Closure of the Courtroom.

In *Waller*, this Court held that before a courtroom may be closed over the objection of the defendant, the court must consider whether there are reasonable alternatives to closure. This Court had no occasion to decide in *Waller* whether any particular measure would constitute a reasonable alternative to closure. Nor, in *Waller*, did this Court have any occasion to decide whether the four-part test enunciated in that decision fully applies even when, because the trial court has devised a reasonable alternative to closure, the courtroom is *not* closed.

Whether the use of a screen, such as was proposed by the trial court in this case, is a reasonable alternative to closure is a question on which courts have differed. A number of courts have concluded that if a screen is not too obtrusive, it can constitute a reasonable alternative to closure, and that cautionary instructions can mitigate any prejudice to the defendant from the jury's speculation about the reason for the screen. *See, e.g., United States v. Lucas*, 932 F.2d 1210 (8th Cir.), *cert. denied*, 502 U.S. 949 (1991); *State v. Schultzen*, 522 N.W.2d 833 (Iowa 1994); *State v. Suarez*, 867 S.W.2d 583 (Mo. Ct. App. 1993); *People v. Tocco*, 258 A.D.2d 374, 685 N.Y.S.2d 699 (App. Div.), *cert. denied*, 528 U.S. 968 (1999). Other courts have suggested, without deciding, that the prejudicial impact of a screen may be so great

that it cannot qualify as a reasonable alternative. *See, e.g., Ayala v. Speckard*, 131 F.3d 62, 71-72 (2d Cir. 1997) (en banc), *cert. denied*, 524 U.S. 958 (1998); *People v. Ramos*, 90 N.Y.2d 490, 505, 685 N.E.2d 492, 500-01, 662 N.Y.S.2d 739, 748, *cert. denied*, 522 U.S. 1002 (1997).

The Second Circuit in this case thought it unnecessary to reach this question because, in its view, the alleged failure of the State to satisfy the second prong of the *Waller* test—that the closure be no broader than necessary—precluded the trial court from implementing an alternative to closure (App. at 14a-15a). 439 F.3d at 75-76. That is, in the Second Circuit's view, a record justifying the complete closure of the courtroom is a *prerequisite* to consideration of alternatives to closure, and the state courts, in their failure to recognize this rule, unreasonably applied *Waller*.

However, in *Waller*, this Court set forth the four conditions that must be satisfied before a trial court may properly *close* the courtroom. 467 U.S. at 48. But when the courtroom is *not* closed, the test for determining whether closure is proper ought not to apply. Thus, when the trial court considers whether there are reasonable alternatives to closure and correctly concludes that, indeed, there is a reasonable alternative to closure, then the court need not ensure, for example, that the closure is no broader than necessary, because there is no such closure.

Of course, a trial court may not adopt an alternative to closure that limits the ability of spectators to observe the trial—as the use of a screen does—when there is no justification whatsoever for closing the courtroom. For either the closure of the courtroom *or* such an alternative to closure to be considered, the State must make some threshold showing of need. However, when, as in this

case, the State has presented testimony at a closure hearing sufficient to justify closure of the courtroom to the general public, that threshold showing of need has been made, and it is proper for the trial court to employ alternatives to closure for the defendant's family, if not to close the courtroom to the family as well as the general public. Or, at the very least, when the State has presented evidence sufficient to warrant the closure of the courtroom to the general public *and* when the State further establishes that the defendant's family lives in the area to which the undercover officer will be returning, then it is reasonable for the trial court to consider alternatives to closure for the defendant's family. And, if the court can identify a reasonable alternative to closure, then it need not apply the *Waller* test to the use of that alternative to closure for the defendant's family, even assuming that the *Waller* test could ever authorize closure to the general public but prohibit closure to the defendant's family.

In this case, the state trial court sought to devise a means for protecting the safety and effectiveness of an undercover police officer while enabling the defendant's family to attend the entire trial. Because the trial court's ruling that the defendant's family members would be allowed in the courtroom during the officer's testimony only if they sat behind a screen was not a closure, but rather, an alternative to closure, that ruling was proper under *Waller*, and at the very least did not constitute an unreasonable application of *Waller*. *See* 28 U.S.C. § 2254(d)(1); *Yarborough*, 541 U.S. at 663-64.

Therefore, this Court should grant a writ of certiorari to resolve the important Sixth Amendment questions presented by this case.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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May 17, 2006

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: November 2, 2005
Decided: February 17, 2006)

Docket No. 04-6665-pr

JOSE RODRIGUEZ,

Petitioner-Appellant,

—v.—

DAVID MILLER, Superintendent,
Eastern Correctional Facility,

Respondent-Appellee.

Before:

CARDAMONE, MCLAUGHLIN, and B.D. PARKER,
Circuit Judges.

Petitioner appeals from the denial of his petition for a writ of habeas corpus by the United States District Court for the Eastern District of New York (Block, *J.*). The district court held that the state court order that Petitioner's mother and brother be excluded during the testimony of an undercover officer, unless they con-

sented to sitting behind a screen, did not violate Petitioner's Sixth Amendment right to a public trial.

REVERSED AND REMANDED WITH DIRECTIONS TO GRANT THE PETITION.

KATHERYNE M. MARTONE, Legal Aid Society, Criminal Appeals Bureau, New York, N.Y. (Mitchell J. Briskey, *on the brief*) *for Petitioner-Appellant.*

VICTOR BARALL, Assistant District Attorney, for Charles J. Hynes, District Attorney, Kings County, Brooklyn, N.Y. (Leonard Joblove, *on the brief*) *for Respondent-Appellee.*

MCLAUGHLIN, *Circuit Judge*:

Jose Rodriguez sought a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He claims that the state trial court's exclusion of his mother and brother during the testimony of an undercover officer, unless they consented to sitting behind a screen, violated his Sixth Amendment right to public trial. The United States District Court for the Eastern District of New York (Block, *J.*) denied Rodriguez's petition. *See Rodriguez v. Miller*, No. 00-cv-3832, 2001 WL 1301732 (E.D.N.Y. Oct. 22, 2001).

Following an appeal by Rodriguez, this Court vacated and remanded for further consideration. *See Rodriguez v. Miller*, No. 01-2719, 82 Fed. Appx. 715 (2d Cir. Nov. 18, 2003). On remand, the district court

again denied the petition. *See Rodriguez v. Miller*, No. 00-cv-3832, 2004 WL 3567978 (E.D.N.Y. Nov. 24, 2004). He now appeals that order.

BACKGROUND

In December 1995, Rodriguez stood trial in New York State Supreme Court, Kings County, on three counts of criminal sale of a controlled substance, two counts of criminal possession of a controlled substance in the second degree, and three counts of criminal possession of a controlled substance in the third degree.

At trial, the sole witness for the prosecution was Undercover Officer 1068 (the "Undercover"), to whom Rodriguez had sold cocaine. The prosecution moved to have the courtroom closed during the Undercover's testimony, thus prompting the court to conduct a hearing to determine the propriety and scope of a closure pursuant to *People v. Hinton*, 31 N.Y.2d 71 (1972).

The Undercover, the lone witness at the hearing, testified as follows.

He had been an undercover officer for two-and-a-half years, and during that time he had been involved in "buy and bust operations and long term investigations" in the Bushwick area of Brooklyn. He intended to return to Bushwick "in the near future." The Undercover added that he had received numerous threats in cases arising from his work in the Bushwick area and had some "lost subjects," *i.e.*, "buy and bust" subjects who had evaded arrest in Bushwick.

The Undercover further stated that, although he had appeared in many drug cases, he had never testified in open court. Nor had he revealed his name in appear-

ances before the grand jury. The Undercover also claimed that he feared testifying in front of Rodriguez's relatives at trial, explaining that "if any of [Rodriguez's] family, relatives or friends see me, they'll be able to know I am a police officer and go back and spread the word around."

On cross-examination, the Undercover admitted that Rodriguez had never threatened him and he had never seen Rodriguez, or any of his associates, in possession of a gun. Additionally, the Undercover conceded that he did not know any of Rodriguez's relatives, and had no reason to believe that Rodriguez's mother was involved in drug dealing. Finally, the Undercover stated that he had never been directly threatened, but instead, had only learned of potential threats via conversations with informants.

Following this testimony, the prosecution renewed its request to have the courtroom closed during the Undercover's testimony. Specifically, the prosecution argued that the Undercover's fear that his identity would be revealed and that drug dealers in Bushwick could find out about his undercover status justified the closure. In response, Rodriguez's counsel reminded the court that it "[had] to make certain findings in order to close the courtroom." The court retorted that "what the witness said seems to fit the parameters . . . set forth in the cases. He's going back to the neighborhood, expects to go back to the neighborhood, he's still working in the neighborhood, lost subjects, fear for personal safety. It's well founded, it would seem."

Rodriguez's counsel conceded that some form of closure was necessary but argued that relevant state precedent precluded the court from excluding the Petitioner's family. The court inquired as to what family members would attend the trial on the day of the

Undercover's testimony. Rodriguez's counsel replied that Rodriguez's mother "might possibly" attend. The prosecution objected to the mother's attendance, reasoning that "[i]f [the mother] tells somebody [that] this undercover will be testifying back and forth [for] several days in this building and be in the area, she can point him out to somebody." Rather than rule on whether the mother could attend, the court adjourned, stating "we'll concern ourselves with [this issue] if and when there is a desire on the part of the defendant's mother to attend."

The next day, Rodriguez's mother and brother sought entry into the courtroom prior to the Undercover's testimony. The court ruled that closure was necessary, but it would permit Rodriguez's mother and brother to attend the proceedings provided a screen was set up "so that the jury in a position to observe the witness, but not the people in the spectator's section." The court made no particular findings as to why the exclusion of Rodriguez's mother and brother was necessary.

Rodriguez's attorney objected to the use of the screen, and stated that he would direct Rodriguez's mother and brother to wait outside the courtroom. He chose this approach out of fear that the "screen creates a substantial amount of prejudice . . . because the only thing that the jury can conclude is that the screen is being set up so that spectators can't see the witness and that means the witness is in danger." The court offered to give any reasonable curative instructions to allay this concern. Rodriguez's attorney rejected the offer.

Rodriguez was eventually convicted. He appealed his conviction to the Appellate Division, Second Department, arguing that the closure order deprived him of his right to a public trial. The Appellate Division affirmed, stating that "[t]he court properly

exercised its discretion when it closed the courtroom during the [Undercover's testimony]. The officer testified that he would be returning to the area where the arrest took place—an area where he had been threatened—and that if his identity was revealed that information could be disseminated in that area, resulting in his safety being jeopardized." *People v. Rodriguez*, 685 N.Y.S.2d 252 (2d Dep't 1999). Leave to appeal to the New York Court of Appeals was denied. *People v. Rodriguez*, 93 N.Y.2d 978 (1999).

In June 2000, Rodriguez filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. He claimed that the trial court violated his Sixth Amendment right to a public trial when it conditioned the attendance of his mother and brother at the Undercover's testimony upon their sitting behind a screen. The district court denied the petition, finding that "[e]ven if incorrect, it certainly cannot be concluded that the [state court's] decision was unreasonable." *Rodriguez v. Miller*, No. 00-cv-3832, 2001 WL 1301732, at *5 (E.D.N.Y. Oct. 22, 2001).

In November 2003, following an appeal by Rodriguez, this Court vacated the judgment of the district court and remanded for reconsideration in light of *Yung v. Walker*, 341 F.3d 104, 111 (2d Cir. 2003) (holding that, in order to exclude a relative, the court must be convinced that the "exclusion of that particular relative is necessary to protect the overriding interest at stake"). *See Rodriguez v. Miller*, 82 Fed. Appx. 715, 716 (2d Cir. Nov. 18, 2003). This Court also instructed the district court to examine:

> (1) whether it was necessary to exclude Rodriguez's family members in order to ensure the safety and efficacy of the [Under-

> cover]; (2) whether the use of a screen is properly characterized as a partial closure or as an alternative to closure within a *Waller* analysis; (3) whether assuming the use of the screen was an alternative to closure, it is a reasonable alternative within the meaning *Waller* given its potential prejudicial effect; and [(4)] whether assuming the use of the screen is a partial closure, the state court reasonably applied *Waller* by mandating the use of the screen.

Id.

On remand, the district court again denied Rodriguez's petition. *See Rodriguez v. Miller*, No. 00-cv-3832, 2004 WL 3567978 (E.D.N.Y. Nov. 24, 2004). The district court judge methodically addressed our instructions.

First, he concluded that it was necessary to exclude Rodriguez's mother and brother because they "lived in close proximity to the area in which the [Undercover] was returning to resume his undercover duties . . . creating a likelihood that either of them would encounter the officer in the course of their daily activities." *Id.* at *6. In so holding, the court considered new evidence—a Criminal Justice Agency Interview Report—indicating that Rodriguez's mother lived in the Bushwick area and that his brother lived nearby in Ridgewood, Queens. Rodriguez objected to this "new evidence."

Second, the district court characterized the use of the screen as an alternative to closure, not a partial closure, because "the use of a screen permits spectators to remain in the courtroom and listen contemporaneously to the witness's testimony." *Id.* at *8.

Third, in deciding whether the use of the screen is a reasonable alternative to closure, the district court

recognized two countervailing interests: (1) "the government's interest in inhibiting the disclosure of sensitive information"; and (2) "the defendant's right to a fair and public trial." *Id.* at *9. Balancing these interests, the court "presume[d] that the use of a screen is not *per se* unreasonable." *Id.* Because it was not clear from the record what type of screen would be used or where it would have been placed—inquiries that the district court found were "incumbent upon the defendant to make"—the court declined to address the reasonableness issue. *Id.*

Fourth, the court held that even if the use of the screen constituted a partial closure rather than an alternative to closure, the trial court's decision to use a screen was constitutional. *Id.* at *10.

The district court granted a Certificate of Appealability.

Rodriguez now appeals.

DISCUSSION

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may award habeas corpus relief with respect to a claim adjudicated on the merits in state court only if the adjudication resulted in an outcome that: (1) was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[1] 28 U.S.C. § 2254(d).

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[1] Rodriguez does not suggest that the state court made an unreasonable determination of the facts.

A state court adjudication is "contrary to" clearly established federal law only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Under this standard, "a federal habeas court may not issue the writ simply because that court concludes on its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. "Some increment of incorrectness beyond error is required" in order to grant the writ. *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000). "[H]owever, . . . the increment need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Id.* (internal quotations omitted).

The Sixth Amendment commands that "the accused shall enjoy the right to a . . . public trial." U.S. Const. Amend. VI. Intrinsic to the public trial right is an individual's right to have family members and friends present at his trial, a right "this Court takes very seriously." *Carson v. Fischer*, 421 F.3d 83, 91 (2d Cir. 2005); *see also Guzman v. Scully*, 80 F.3d 772, 776 (2d Cir. 1996) ("The exclusion of courtroom observers, especially a defendant's family members and friends, even from part of a criminal trial, is not a step to be taken lightly."); *Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir. 1994) (noting the Supreme Court's "special

concern for assuring the attendance of family members of the accused"). However, the right of an accused to have a "public trial" is not absolute, and "may give way in certain cases to other rights or interests." *Waller v. Georgia*, 467 U.S. 39, 45 (1984).

In *Waller*, the Supreme Court spoke definitively about courtroom closures: "(1) the party seeking to close the courtroom must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceedings, and (4) [the trial court] must make findings adequate to support the closure." *Ayala v. Speckard*, 131 F.3d 62, 69 (2d Cir. 1997) (en banc) (citing *Waller*, 467 U.S. at 48).

Rodriguez concedes that the state court's closure with respect to the *general public* was consistent with *Waller*. Thus, we need only consider whether the trial court's order, requiring Rodriguez's *family* to remain outside the courtroom unless they agreed to sit behind a screen, was an unreasonable application of *Waller*.[2]

The first two prongs of the *Waller* test ensure that a defendant's right to a public trial is abridged only to the extent necessary to protect any overriding interest. According to the State, the overriding interests here were the protection of the Undercover and the preservation of his effectiveness. Both of these concerns are solidly anchored, considering that the Undercover

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[2] Rodriguez argues that the Appellate Division, "in upholding [the] baseless exclusion of [his] family members, refused to apply [the *Waller* test]." This is hyperbole. The Appellate Division, although never specifically mentioning *Waller v. Georgia*, applied the correct legal standard. The Appellate Division relied on state cases citing federal law, including *Waller*. *See, e.g., People v. Ramos*, 90 N.Y.2d 490 (1997).

planned to return to work in Bushwick, and he was concerned that his safety would be jeopardized. *See Brown v. Artuz*, 283 F.3d 492, 501-02 (2d Cir. 2002) (the "safety of a police officer working undercover surely constitutes an overriding interest"); *Nieblas v. Smith*, 204 F.3d 29, 33 (2d Cir. 1999) ("important interest" necessary for closure of courtroom includes the need to protect an undercover officer's anonymity and safety); *Ayala*, 131 F.3d at 72 (the "state interest in maintaining the continued effectiveness of an undercover officer is an extremely substantial interest").

These concerns may justify barring the attendance of the general public, but alone they do not support the exclusion of Rodriguez's mother and brother. A court must make "adequate" findings in order to exclude a family member. *Waller*, 467 U.S. at 48. These findings must convince the court "that the exclusion of that particular relative is necessary to protect the overriding interest at stake." *Yung*, 341 F.3d at 111 (stating that "it would be an unreasonable interpretation of *Waller* for a court to deny [a request to be exempted from an exclusion] if the exclusion of that particular relative, under the specific circumstances at issue, is not necessary to promote the overriding interest"). Thus, any alleged threat posed by a family member to an undercover's safety or effectiveness must be established by more than mere speculation. Instead, the trial court must make a "*particularized inquiry* into whether [exclusion of the family member] was necessary to advance an overriding interest." *Carson*, 421 F.3d at 91.

Here, there was no particularized inquiry into whether Rodriguez's family posed any threat to the Undercover's safety or effectiveness beyond the conclusory statements of the Undercover. In fact, the

trial court made *no* findings with respect to the mother or brother. Furthermore, the Undercover had never encountered nor did he even know anyone in Rodriguez's family. And there was no indication that either Rodriguez's mother or brother was dangerous, knew of his criminal activity, or was familiar with any of his associates.

The State emphasized that Rodriguez's mother and brother lived close to where the Undercover operated and where he would be returning. While the trial court made no such finding, additional evidence submitted to the district court showed that Rodriguez's mother lived approximately twelve blocks from where the Undercover and Rodriguez conducted their drug deal and Rodriguez's brother lived within three blocks of another location where a drug deal between the Undercover and Rodriguez took place. The district court found this evidence compelling. We do not. Mere proximity is not enough to establish a threat to the Undercover's safety or efficacy. *See Vidal*, 31 F.3d at 69 (holding that, despite the fact that the parents lived within three miles of the arrest site, the exclusion of a defendant's parents was not necessary to protect the State's interest in assuring officer's safety, absent evidence that parents were inclined to harm a police officer or were likely to encounter the officer during an undercover operation).

The district court relied heavily on *Sevencan v. Herbert*, 342 F.3d 69, 77 (2d Cir. 2003), to support its determination. Although it is a close question, we conclude that this reliance was misplaced. In *Sevencan*, we denied habeas relief and held that the trial court's exclusion of the defendant's wife was proper because the undercover testified that he intended to return to the area in which the defendant

"plied his narcotics trade" and the trial court found it likely that he might encounter the defendant's wife. *Id.* at 77. The petitioner's case has a surface similarity to *Sevencan*. However, there are two crucial differences.

First, the *Sevencan* court's conclusion that there was a likelihood that the undercover and the defendant's wife would encounter each other was based on specific facts indicating that the defendant's wife "was likely to have encountered the undercover officer in the course of her daily activities." *Id.* It was not based on general proximity alone. *See id.*

Second, the trial court also made specific findings regarding the defendant's wife's familiarity with her husband's associates, many of whom were highly dangerous. *Id.* Thus, there was at least some modicum of evidence demonstrating an *actual* threat to the undercover from the defendant's wife if she were to witness his testimony. *See id.* (concluding that "Mrs. Sevencan is . . . likely to be susceptible to requests from her husband's associates to inform them if she spotted the undercover officer"). Here, the district court's implicit finding that Rodriguez's mother and brother posed a threat rested only on conjecture.

The district court also found it "fair to glean from the trial record that the [Undercover] would be traveling to and from the courthouse to testify over a number of days, which heightened the risk to his safety because Rodriguez's mother or brother could point him out to others around the courthouse." There is no reason, however, to believe that the trial court could not have taken appropriate precautions to prevent Rodriguez's mother or brother from encountering him in or around the courthouse, such as permitting the Undercover to use an alternate entrance to the courtroom or courthouse.

Finally, the district court, as does the State, relied on the Undercover's testimony that he feared testifying in front of Rodriguez's family because it would enable them to disclose his identity to "people in the neighborhood that the defendant knows." However, such a naked assertion, without more, does not justify excluding a defendant's family members.

The parties dedicate much of their briefs to an issue that is close to casuistic: whether the use of a screen is an "alternative to closure" or a "partial closure." The distinction is significant because of how it may affect the *Waller v. Georgia* analysis. Under the third prong of *Waller*, a court, having decided that some form of closure is necessary, must consider "reasonable alternatives to closure." If, however, the screen was a "partial closure," the *Waller* analysis remains unchanged. This Court has on several occasions treated screens as an alternative to closure. *See, e.g., Pearson v. James*, 105 F.3d 828, 830 (2d Cir. 1997) (noting that state court judge did not consider "alternatives, such as placing a screen between the undercover officer and the spectators"); *Okonkwo v. Lacy*, 104 F.3d 21, 26 (2d Cir. 1997) (discussing *Ayala*, we "suggested some possible alternatives to closure during [an undercover's] testimony: a strategically placed board to conceal the witness from public view"). We have used the term "partial closure" in situations where a closure lasts for only a limited period of time, *see, e.g., ABC, Inc. v. Stewart*, 360 F.3d 90, 105 (2d Cir. 2004) (exclusion of public during *voir dire* considered "partial closure"), or excludes only a particular group of spectators, *see, e.g., English v. Artuz*, 164 F.3d 105, 109 (2d Cir. 1998) (exclusion of just the defendant's family characterized as "partial closure").

We need not journey into this semantic bog for two reasons. First, a screen was never actually used, thus making this a less than ideal posture in which to decide where a screen falls on the spectrum of closures. Second, our ruling that any type of closure excluding Rodriguez's family was improper here makes it unnecessary to address "alternatives to closure" under *Waller*'s third prong.[3]

Recognizing that exclusion of family members requires stricter scrutiny than exclusion of the public, we hold that the trial court's findings, as supplemented by the district court, are insufficient to establish that the exclusion of Rodriguez's mother and brother was necessary to protect the State's overriding interest. Neither the State's contentions nor the district court's reasoning convince us otherwise. Thus, Rodriguez is entitled to the writ he seeks.

CONCLUSION

Because the trial court's closure order violated Rodriguez's Sixth Amendment right to a public trial, we REVERSE the judgment of the district court and REMAND with directions to grant the writ of habeas corpus, conditioned on the state's right to retrial within ninety days.

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[3] Additionally, in light of our holding, we need not address Rodriguez's contention that the district court erred by expanding the record.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MEMORANDUM & ORDER
Case No. 00-CV-3832 (FB)

JOSE RODRIGUEZ,

Petitioner,

—against—

DAVID MILLER, Superintendent,
Eastern Correctional Facility,

Respondent.

Appearances:
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BLOCK, District Judge:

Jose Rodriguez ("Rodriguez") seeks a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254, claiming that the state trial court's decision to allow his family members to remain in the courtroom on the condition that they sat behind a screen deprived him of his Sixth Amendment right to public trial pursuant to *Waller v. Georgia*, 467 U.S. 39 (1984). The Court initially denied his petition, *see Rodriguez v. Miller*, 2001 WL 1301732 (E.D.N.Y. Oct. 22, 2001), but the Second Circuit vacated and remanded for reconsideration in light of its decision in *Yung v. Walker*, 341 F.3d 104 (2d Cir. 2003). *See Rodriguez v. Miller*, 82 Fed. Appx. 715 (2d Cir. 2003). For the reasons set forth below, Rodriguez's petition is again denied.

BACKGROUND

A. This Court's Prior Decision

In its October 22, 2001 Memorandum and Order, the Court recounted the pertinent facts as follows:

> Petitioner's conviction arose out of a 'buy and bust' drug transaction. At petitioner's state court trial, the prosecution moved to close the courtroom to all spectators, including the petitioner's family, during the testimony of the undercover officer who had purchased drugs from the petitioner. The trial court conducted *a Hinton* hearing on the issue outside the jury's presence. *See People v. Hinton*, 31 N.Y.2d 71 (1972) (state court inquiry into factors justifying courtroom closure).

Undercover Officer 1068 was the sole witness at the hearing. The officer testified as follows: He had worked as an undercover police officer for approximately two and a half years. Tr. [at] 562.[1] During that time he had been involved in both "buy and bust" operations and long-term operations. *Id.* at 563. He was involved in active, long-term narcotics investigations in the Bushwick area of Brooklyn and had 'definite' plans to return to that area following his testimony. *Id.* at 563-64. He had open cases pending in the Kings County Supreme Court and had fears about his identity being revealed in court. *Id.* He had been threatened numerous times in the Bushwick area. *Id.* at 563. Specifically, "numerous subjects' of his had said 'that if they (were) to find (him), they would kill (him)." *Id.* at 564. He had some "lost subjects," *i.e.*, buy and bust subjects who had evaded arrest in his open cases. *Id.* at 564-65.

The officer further testified that he would have fears for his safety if his identity were revealed to the defendant's family. *Id.* at 565. He explained that "if any of the defendant's family, relatives or friends see me, they'll be able to know I am a police officer and spread the word around." *Id.* On cross-examination by defense counsel, however, the officer admitted that the defendant had never threatened him, that he did not know the defendant's family, and that he had no reason to believe that the defendant's family was dangerous, involved in drug dealing or knew any drug dealers. *Id.* at 566-67.

After the hearing, defense counsel informed the court that it "(had) to made certain findings in order

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[1] "Tr." refers to the transcript of the trial, which included the *Hinton* hearing.

to close the courtroom." *Id.* at 572. In response, the court stated that "what the (officer) said seems to fit the parameters, within the principles set forth in the cases. He's going back into the neighborhood, expects to go back to the neighborhood, he's still working in the neighborhood, lost subjects, fear(s) for personal safety. It's well-founded, it would seem." *Id.*

The court then inquired as to which family members would be attending the undercover officer's testimony. Defendant's counsel stated that the defendant's mother might attend. The prosecution opposed the mother's attendance, explaining that "if she tells somebody and this undercover will be testifying back and forth on several days in this building and be in the area, she can point him out to somebody. There is a danger." *Id.* at 576. At that point, the court adjourned until the following day, stating "we'll concern ourselves with (the issue) once more if and when there is a desire on the part of the defendant's mother to attend." *Id.* at 576-77.

The next day, defendant's mother and brother arrived at the courtroom to attend the trial. The court then issued its ruling. It first noted that the evidence at the hearing was "sufficient to warrant" the closure of the courtroom. *Id.* at 581. "The open question" for the court was "whether there should be an exception made for the . . . relatives to be present and set up a screen so that the jury is in a position to observe the witness, but not the people in the spectator's section." *Id.* at 582. At that point the following colloquy ensued between the court and defense counsel:

MR GOLDSTEIN: Judge, if that is the court's ruling, I'm going to ask my client's mother and brother to remain outside the courtroom. I fear that setting up the screen creates a substantial amount of prejudice to my client because the only thing the jury can conclude is that the screen is being set up so that the spectators can't see the witness and that means the witness is in danger. I think my client's mother and brother should be permitted entry without any screens.

THE COURT: Yes, Mr. Goldstein, certainly any requested, appropriated and reasonable curative instructions [will] be given, should that, such a request, be made by the defense.

MR. GOLDSTEIN: Judge, my opinion is that no instructions would be sufficient. And if that's the Court's ruling, I'm going to ask my client's mother and brother to remain outside.

THE COURT: All right. Do you want to do that now?

MR. GOLDSTEIN: Yes.

* * *

THE COURT: . . . . To make sure that the record is clear concerning the ruling made a moment ago, the use of the screen plus the curative instruction would seem to the court would be sufficient to protect the defendant's legitimate rights. I . . . think given the state of the of the press and other media events in the metropolitan area in recent months that very few are under the impression that being an undercover

> police officer is a course of conduct that is as safe as staying in bed after retirement in Florida. Further, in light of the argument made by the Assistant District Attorney, the Court's impression (is) that a substantial cogent case can be made for the proposition that even on the basis of the testimony given and the state of the record and the fact that the undercover police officer will be moving in the neighborhood from the courthouse, at least a couple of days, presumably, the risks of recognition and identification while in transit would also be substantial. The defense has an exception.

Id. at 582-84. Thereafter, the trial resumed with the testimony of the officer, during which the courtroom was completely closed.

Defendant appealed his conviction to the Appellate Division, Second Department, which affirmed explaining:

> There is no merit to the defendant's contention that he was denied his right to a public trial because his family was, in essence, precluded from attending the trial as a result of the trial court's decision to use a screen to block their view of the testimony of the undercover officer . . . . Moreover, the court ordered an alternative to closure with regard to the defendant's family, allowing them to remain in the courtroom during the officer's testimony provided that a screen was placed so as to block their view of the undercover officer. Accordingly, the defendant was not deprived of his right to a public trial.

> *People v. Rodriguez*, 685 N.Y.S.2d 252 (2d Dep't. 1999) [internal citations omitted].
>
> Leave to appeal to the Court of Appeals was denied. [*See*] *People v. Rodriguez*, 93 N.Y.2d 978.

Rodriguez, 2001 WL 1301732, at *1-3.

Although AEDPA clearly governs this case, the Court commented that "even under pre-AEDPA review, the state court's decision would likely be upheld as a correct application of *Waller*." *Id.* at *5. The Court determined that "even if [the state court's decision was] incorrect, it certainly cannot be concluded that the decision was unreasonable under the post-AEDPA review." *Id.*

B. Second Circuit Remand

By summary order, the Second Circuit vacated and remanded, "largely because the district court did not have the benefit of our recent decision in *Yung v. Walker*, 341 F.3d 104 (2d Cir. 2003)." *Rodriguez*, 82 Fed. Appx. at 716. The circuit court noted:

> Both the state and the district courts assumed that the use of the screen was an alternative to closure rather than a partial closure. Neither considered whether it was necessary to close the courtroom to Rodriguez's relatives before considering whether the screen constituted a reasonable alternative to closure. Finally neither court considered the possible prejudice to Rodriguez from the use of a screen when assessing whether its use was a reasonable alternative to closure.

Rodriguez, 82 Fed. Appx. at 716. Citing *Yung*, the circuit court explained:

> *Waller*'s second mandate—that the closure be no broader than required to protect the overriding inter-

> est at stake—necessarily applies to both the duration of the closure and to the portion of the public to be excluded. Thus *Waller* prevents a court from denying a family member's request to be exempted from a courtroom closure order unless the court is convinced that the exclusion of that particular relative is necessary to protect the overriding interest at stake. Indeed it would be an unreasonable interpretation of *Waller* for a court to deny such a request if the exclusion of that particular relative under the specific circumstances at issue, is not necessary to promote the overriding interest.

Id. Thus, the circuit court directed the Court to address the following issues on remand:

> (1) whether it was necessary to exclude Rodriguez's family members in order to ensure the safety and efficacy of the undercover officer; (2) whether the use of a screen is properly characterized as a partial closure or an alternative to closure within a *Waller* analysis; (3) whether assuming the use of the screen is an alternative to closure, it is a reasonable alternative within the meaning of *Waller* given its potential prejudicial effect; and (4) whether assuming the use of the screen is a partial closure, the state court reasonably applied *Waller* by mandating the use of the screen.

Id. The circuit court commented that it "express[ed] no views on the merits of any of these questions." *Id.*

STANDARD OF REVIEW

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), when a federal claim has been "adjudicated on the merits" by a state court, the

state court's judgment is entitled to substantial deference. *See* 28 U.S.C. § 2254(d). "[A] state court adjudicates a state prisoner's federal claim on the merits when it (1) disposes of the claim on the merits, and (2) reduces its disposition to judgment." *Sellan v. Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001) (citations and quotations omitted). For claims "adjudicated on the merits," *habeas* relief may not be granted unless the state court decision 1) was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or 2) was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly established federal law "if the state court applies a rule that contradicts the governing law set forth" in Supreme Court precedent or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives" at a different conclusion. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court decision involves an "unreasonable application" of clearly established federal law if it unreasonably applies Supreme Court precedent to the particular facts of a case. *See id.* at 409. This inquiry requires a court to "ask whether the state court's application of clearly established federal law was objectively unreasonable," not whether the application was erroneous or incorrect. *Id.* In that respect, the standard to be applied "falls somewhere between merely erroneous and unreasonable to all reasonable jurists." *Wade v. Mantello*, 333 F.3d 51, 57 (2d Cir. 2003) (quoting *Jones v. Stinson*, 229 F.3d 112, 119 (2d 2000)). However, the "increment [of incorrectness beyond error] need not be great; otherwise, habeas relief would be limited to

state court decisions so far off the mark as to suggest judicial incompetence." *Eze v. Senkowski*, 321 F.3d 110,125 (2d Cir. 2003) (quoting *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000)).

DISCUSSION

The Supreme Court in *Waller* announced the standard for courtroom closure:

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Waller, 467 U.S. at 48. The Supreme Court did not consider the standard to apply when family members request an exemption from the courtroom-closure order.

However, prior to its decision in *Waller*, the Supreme Court commented in *dicta* that "an accused is at the very least entitled to have his friends, relatives and counsel present [at trial], no matter what offense he may be charged." *In re Oliver*, 333 U.S. 257, 271-72 (1948). In light of this *dicta*, the Second Circuit, in *Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir. 1994), required at a minimum, "evidence that the [relative] w[as] inclined to harm or . . . likely to encounter the undercover officer[,]" before closing the courtroom to family members. *Yung*, 341 F.3d at 110 (citing *Vidal*, 31 F.3d at 69).

In *Yung*, however, the Second Circuit ruled that under post-AEDPA review the more stringent *Vidal* standard was not applicable because it was not clearly established Supreme Court law. *See id.* at 110. Nonetheless, because

"*Waller*'s second mandate . . . necessarily applies to both the duration of the closure and to the portion of the public to be excluded[,]" it construed *Waller* as "prevent[ing] a court from denying a family member's request to be exempted from a courtro.om closure order unless the court is convinced that the exclusion of that particular relative is necessary to protect the overriding interest at stake." *Id.* at 110-11. Thus, "if the exclusion of [a] particular relative, under the specific circumstances at issue, is not necessary to promote the overriding interest," a denial of the family member's request to be present would be an unreasonable application of *Waller*. *Id.* at 111. In *Sevencan v. Herbert*, 342 F.3d 69 (2003), the Second Circuit applied the standard set forth in *Yung*, holding that it was not an unreasonable application of *Waller* to exclude the defendant's wife because she lived in the neighborhood where the undercover officer intended to conduct further undercover work and was susceptible to requests from her husband's associates to divulge the officer's identity. *See id.* at 76-77.

1. Whether Exclusion of Rodriguez's Family Members was Necessary?

The government argues that closure was necessary because, as the officer testified, "if any of the immediate subject's family, relatives or friends see [the officer], they'll be able to . . . go back and spread the word around." Tr. at 565. Although the officer conceded that he had never been threatened by the defendant or his family, nor had any reason to believe the defendant's family was involved in drug dealing, he stated that Rodriguez's relatives might disclose his identity as an undercover police officer to "people in the neighborhood that the defendant knows." *Id.* at 570.

The government contends that implicit in the officer's testimony was that both Rodriguez's mother and brother both lived in or near the Bushwick neighborhood; however, no such finding was made by the trial court. The government has now submitted documentary evidence that Rodriguez's mother and brother lived in close geographic proximity to the area where the undercover officer operated and would be returning. Specifically, a Criminal justice Agency Interview Report states that at the time of his arrest, Rodriguez lived with his mother at 146 Knickerbocker Avenue in Bushwick. *See* Supplemental Aff., On Demand From Second Circuit, in Opp'n to Pet. for Writ of Habeas Corpus of Victor Barrall ("Barrall Supplemental Aff."), Ex. 2. Other records of the Department of Correctional Services submitted to the Court on remand establish that Rodriguez's brother lived at 1866 Madison Street and/or 1875 Madison Street in Ridgewood, Queens, a neighborhood adjacent to Bushwick. *See* Barrall Supplemental Aff., Ex. 3. Street maps of the area show that Rodriguez's mother lived approximately twelve blocks from where Rodriguez and the officer conducted a transaction and that Rodriguez's brother lived within three blocks of another location where a transaction between the officer and Rodriguez occurred. *See* Barrall Supplemental Aff., Ex. 4.

Rodriguez objects to the court's consideration of this evidence; however, he did not request a hearing to challenge its substance. Although this evidence was not before the trial court, it is entirely appropriate for this Court to consider it. As the Second Circuit has instructed:

> where either [petitioner had made only a perfunctory objection at trial to the courtroom closure or the law changed after trial, creating a greater necessity for a fully-developed record] or any similar rea-

> son exists, it is particularly appropriate for a habeas court to gather additional evidence—rather than granting the defendant the windfall of a new trial—where the alleged constitutional violation does not affect the fairness of the outcome at trial, as in courtroom closure cases.

Sevencan, 342 F.3d at 77 (citing *Nieblas v. Smith*, 204 F.3d 29, 32 (2d Cir. 1999)). *See also Gonzalez v. Quniones*, 211 F.3d 735, 738 (2d Cir. 2000) ("[A] federal court considering a habeas petition premised on a closure of the courtroom is not limited to the factual record developed at trial, but may, in its discretion, hold a reconstruction hearing in order to gather more information as [to] whether the closure was proper under the circumstances of the case."). The Court is warranted in considering this additional evidence because, although Rodriguez requested that his relatives be exempted from the closure order, his objection was only perfunctory. *See* Tr. at 575 (informing the trial court only that there was a case "that states there is no real reason to exclude [Rodriguez's] family from the courtroom").

As in *Sevencan*, Rodriguez's mother and brother both lived in close proximity to the area in which the officer was returning to resume his undercover duties and where the transactions with Rodriguez had taken place, creating a likelihood that either of them would encounter the officer in the course of their daily activities. *Compare Sevencan*, 342 F.3d at 77 (sufficient geographic particularity where officer testified he intended to return to bars located in a large shopping area in the defendant's wife's neighborhood), *with Vidal*, 31 F.3d at 69 (refusing to find an encounter likely where relatives "lived in the Bronx" and the officer's unit "operated throughout the Bronx" since the Bronx "covers 41 square miles").

Moreover, it is fair to glean from the trial record that the officer would be traveling to and from the courthouse to testify over a number of days, which heightened the risk to his safety because Rodriguez's mother or brother could point him out to others around the courthouse. Furthermore, the officer testified that he specifically feared Rodriguez's family's ability to disclose his identity to "people in the neighborhood that the defendant knows." Tr. at 569. *Cf. English v. Artuz*, 164 F.3d 105,109 (2d Cir. 1998) (findings not adequate to warrant closure where, *inter alia*, officer testified that "he was not afraid of testifying before [the defendant's] family").

Based on the officer's testimony and the new information presented subsequent to the remand, the Court determines that the exclusion of Rodriguez's mother and brother was necessary "to promote the overriding interest" in the officer's safety and effectiveness. It makes this determination *de novo* because the Second Circuit has yet to determine whether AEDPA deference can apply to determinations rendered by a federal habeas court that considers evidence that was not before the trial court. The Court notes that the two circuits that have considered the issue have held that AEDPA deference applies. *See Matheney v. Anderson*, 377 F.3d 740, 747 (7th Cir. 2004) ("[O]ur case law is clear in holding that § 2254(d) is applicable even though the district judge held an evidentiary hearing." (quotation omitted)); *Valdez v. Cockrell*, 274 F.3d 941, 954 (5th Cir.2001) (same).

B. Alternative to Closure Versus Partial Closure

No court has considered the refined issue of whether the use of a screen constitutes an alternative to closure or a partial closure within the *Waller* analysis, making it

an issue of first impression. However, without deciding this discrete issue, the Second Circuit has referenced on a number of occasions the option of using a screen in the context of the third *Waller* prong—whether the trial court considered reasonable alternatives. *See Okonkwo v. Lacy*, 104 F.3d 21, 26 (2d Cir. 1997) (suggesting "possible *alternatives* to closure during the undercover officer's testimony: a strategically placed board to conceal the witness from public view; a disguise of the witness; and a direction that the defendant specify the individuals he desires to be present in the courtroom, with the state to show cause why any such person should be barred." (emphasis added)); *Pearson v. James*, 105 F.3d 828, 830 (2d Cir. 1997) (evaluating trial court's closure order and noting that "[s]ome *alternatives*, such as placing a screen between the undercover officer and the spectators . . . appear to have been worth considering" (emphasis added)); *Ayala v. Speckard*, 131 F.3d 62, 71-72 (2d Cir. 1997) (*en banc*) (listing "placing a screen between the witness and the spectators" as an *alternative* to closure (emphasis added)); *Vidal*, 31 F.3d at 69 (observing that trial court did not consider "less restrictive *alternatives* such as screening devices to conceal the witness's identity" (emphasis added)). *See also Tocco v. Senkowski*, 2002 WL, 31465803, at *2 (S.D.N.Y. Nov. 4, 2002) (describing the agent's testimony behind a screen as a "less exclusive procedure" compared to excluding the public from the courtroom); *McCarthy v. Portundo*, 2001 WL 826702, at *9 (E.D.N.Y. May 25, 2001) (discussing as an alternative to closure, having a blackboard placed in front of the witness to block the view of family members, who were exempt from courtroom closure order); *United States v. Lucas*, 932 F.2d 1210, 1217 (8th Cir. 1991) (upholding use of screen after district court "considered the use of a disguise, the use of a screen,

and full closure of the courtroom as means of concealing [undercover officer's] identity").

By contrast, the Court's independent research revealed that the Second Circuit has used the term partial closure in several reported cases: in each, partial closure refers to closure of the courtroom to a limited group of spectators or for a limited period of time, not to the use of a screen or other mechanism to shield a witness's identity. *See, e.g., ABC, Inc. v. Stewart*, 360 F.3d 90, 105 (2d Cir. 2004) ("partial closure" when portions of *voir dire* closed to the public); *English v. Artuz*, 164 F.3d 105, 109 (2d Cir. 1998) ("partial closure" when courtroom is closed only to defendant's family); *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992) ("partial closure" when "only members of the defendant's family were excluded and then only for the duration of one witness'[s] testimony."). *See also Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001) (defining partial closures as "situations in which public retains some (though not complete) access to a particular proceeding").

Unlike a partial closure, the use of a screen permits spectators to remain in the courtroom and listen contemporaneously to the witness's testimony. Accordingly, using a screen to shield a witness's identity is most properly characterized as an alternative to closure, not a partial closure.

C. Reasonableness of Using A Screen

The test for evaluating whether an alternative is reasonable is another issue of first impression. The government suggests that the test should encompass whether the proposed alternative 1) deprived the defendant of a due process right, apart from the right to a public trial, and 2) substantially compromised any of the values underlying the right to a public trial. Rodriguez suggests

that an alternative is reasonable only if it eliminates the danger of disclosing the witness's identity. Neither party, however, has located a case directly on point.

In *Tocco*, a district court upheld the use of a screen when challenged on *habeas* review. *See Tocco*, 2002 WL 31465803, at *2. Although not in the context of evaluating whether it was a reasonable alternative, the court simply noted that the trial court "carefully balanced the need to protect the identity of the undercover officer and petitioner's right to a public trial." *Id. See also Lucas*, 932 F.2d at 1217 (concluding that there was "no abuse of discretion in [district court's] conclusion that a screen should be used during [officer's] testimony").

In the Court's view, the "reasonableness" test under the Fourth Amendment, requiring the balancing of the countervailing interests at stake, provides the proper guidance. *Cf. New Jersey v. T.L.O.*, 469 U.S. 325 (1985) ("The determination of the standard of *reasonableness* governing any specific class of searches requires balancing the need to search against the invasion which the search entails." (emphasis added) (citations and quotations omitted)); *Sampson v. City of Schenectady*, 160 F. Supp. 2d 336, 345 (N.D.N.Y. 2001) ("In order to determine whether an officer's use of force meets the Fourth Amendment's *reasonable* standard, a court must carefully balance the 'the nature and quality of the intrusion against the countervailing government interest at stake.' (emphasis added) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989))).

In all courtroom closure cases, there are principally two countervailing interests: the government's interest in inhibiting the disclosure of sensitive information and the defendant's rights to a fair and public trial. *See Waller*, 467 U.S. at 45 ("[T]he right to an open trial may give way in certain cases to other rights or interests,

such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information . . . ."); *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring) ("[Those] who object to closure have the responsibility of showing to the court's satisfaction that alternative procedures are available that would eliminate the dangers shown by the defendant and the State.").

Balancing these interests presumes that the use of a screen is not *per se* unreasonable, which would require a determination, akin to a facial constitutional challenge, that "no set of circumstances exists" under which its use would not deprive a defendant of a fair trial. *See Reno v. Flores*, 507 U.S. 292, 301 (1993) ("To prevail . . . in a facial challenge, respondents must establish that no set of circumstances exists under which the [regulation] would be valid." (citation omitted)). The Second Circuit has not specifically addressed the issue, simply acknowledging the obvious: that the use of a screen could be prejudicial to a defendant because a jury could conclude that it negatively reflects upon the defendant. *See Pearson v. James*, 105 F.3d 828, 830 (2d Cir.1997) (use of a screen to block the witness from the spectators "might [itself] be disadvantageous to a defendant"); *Ayala*, 131 F.3d at 71-72 (suggesting that "placing a screen between the witness and the courtroom spectators . . . [may] imply[ ] to the jury that the family or friends of the defendant in attendance are likely to be dangerous").

In the Court's opinion, it cannot be said that there may not be some circumstances where the use of a screen could be deployed without depriving a defendant of a fair trial. One would have to know specific facts, such as the size and nature of the screen, and whether it could be

placed in the courtroom in question in a location and manner that would not be likely to cause prejudice.

On the record before the Court, it simply cannot be determined what type of screen would have been utilized, or where it would have been placed. It was incumbent upon the defendant to make such inquiries, so that a proper record could be created to address the reasonableness issue. In the present state of the record, all that can be gleaned is that the family presumably would not have submitted to sitting behind a screen under any circumstances. *See, e.g., Overton v. Newton*, 295 F.3d 270, 279 (2002) (denying habeas petition in *Batson* challenge where record was not fully established by defendant). As such, the reasonableness issue cannot be answered, other than to reject the notion of a per se rule, and to articulate the standard to be employed in any future as-applied challenge.

D. Partial Closure and *Waller* Analysis

Even assuming *arguendo* that the use of the screen constitutes a partial closure, and not an alternative to closure, the trial court's decision to use a screen to shield the officer's identity comports with *Waller*. The Court's affirmative answer to the Second Circuit's first question—determining that it was necessary to exclude Rodriguez's mother and brother from the courtroom to protect the government's interest—satisfies the first two prongs of *Waller*. Under the third prong, the trial court never considered whether there could be any alternative to the use of a screen; however, defendant never proposed an alternative, and the trial court could not be faulted for not considering other possibilities. *See Ayala*, 131 F.3d at 72 ("No additional alternatives were suggested by any party, and the trial judges had no obligation to consider additional alternatives *sua sponte*."). As

for the fourth prong, adequate findings have now been made to support the closure.

CONCLUSION

Rodriguez's petition is denied. However, a certificate of appealability is granted as to the issues of whether the use of a screen is a partial or alternative to closure, and, if it is an alternative to closure, whether there are no circumstances under which it could be reasonable. *See* 28 U.S.C. § 2253.

SO ORDERED.

FREDERIC BLOCK
United States District Judge

Brooklyn, New York
November 24, 2004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed November 18, 2003
(01-2719)

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 18th day of November two thousand and three.

Present: GUIDO CALABRESI,
ROSEMARY S. POOLER,
BARRINGTON D. PARKER, JR.,
Circuit Judges.

JOSE RODRIGUEZ,

Petitioner-Appellant,

—v—

DAVID MILLER,

Respondent-Appellee.

Appearing for Appellant:

Katheryne M. Martone, Legal Aid Society, Criminal Appeals Bureau, Brooklyn, NY.

Appearing for Appellee:

Victor Barall, Assistant District Attorney, Brooklyn, NY.

Appeal from the United States District Court for the Eastern District of New York (Block, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **VACATED** and **REMANDED**.

Petitioner Jose Rodriguez appeals from a judgment of the district court denying his application for a writ of habeas corpus. Rodriguez's claim is based on the state court's decision to exclude his brother and mother during the testimony of an undercover officer unless these relatives consented to the use of a screen to conceal the undercover officer's identity. The district court determined that the state appellate court did not unreasonably

interpret *Waller v. Georgia*, 467 U.S. 39 (1984), when it held that the screen was a reasonable alternative to closure. Both the state and district courts assumed that use of the screen was an alternative to closure rather than a partial closure. Neither considered whether it was necessary to close the courtroom to Rodriguez's relatives before considering whether the screen constituted a reasonable alternative to closure. Finally, neither court considered the possible prejudice to Rodriguez from the use of a screen when assessing whether its use was a reasonable alternative to closure. *See Ayala v. Speckard*, 131 F.3d 62, 71-72 (2d Cir. 1997) (en banc) (cautioning that the use of a screen "pose[s] substantial risks to a fair trial for the defendant").

We vacate and remand largely because the district court did not have the benefit of our recent decision in *Yung v. Walker*, 341 F.3d 104 (2d Cir. 2003). In *Yung*, we first reviewed the test *Waller* articulates for courtroom closures. *Id.* at 109. *Waller* allows the closure of the courtroom only if

> the party seeking to close the hearing . . . advance[s] an overriding interest that is likely to be prejudiced, the closure [is] no broader than necessary to protect that interest, the trial court . . . consider[s] reasonable alternatives to closing the proceeding, and it . . . make[s] findings adequate to support the closure.

467 U.S. at 48. We then held that

> *Waller's* second mandate-that the closure be no broader than required to protect the overriding interest at stake-necessarily applies to both the duration of the closure and to the portion of the public to be excluded. Thus *Waller* prevents a court from denying a family member's request,to be exempted from

> a courtroom closure order unless the court is convinced that the exclusion of that particular relative is necessary to protect the overriding interest at stake. Indeed it would be an unreasonable interpretation of *Waller* for a court to deny such a request if the exclusion of that particular relative under the specific circumstances at issue, is not necessary to promote the overriding interest.

Yung, 341 F.3d at 110-11.

On remand, the district court should reconsider its prior holding in light of our determination that it would be an unreasonable application of *Waller* to deny a family member's request to be present for trial if the exclusion of that particular family member is not necessary to promote the overriding interest that the court identified. In reconsidering, it should further examine (1) whether it was necessary to exclude Rodriguez's family members in order to ensure the safety and efficacy of the undercover officer; (2) whether the use of a screen is properly characterized as a partial closure or an alternative to closure within a *Waller* analysis; (3) whether assuming the use of the screen is an alternative to closure, it is a reasonable alternative within the meaning of *Waller* given its potential prejudicial effect; and (3) whether assuming the use of the screen is a partial closure, the state court reasonably applied *Waller* by mandating the use of the screen. We express no views on the merits of any of these questions.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
BY: *LUCILLE CARR*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MEMORANDUM AND ORDER
Case No. 00-CV-3832 (FB)

JOSE RODRIGUEZ,

Petitioner,

—against—

DAVID MILLER, Superintendent,
Eastern Correctional Facility,

Respondent.

Appearances:
For the Petitioner:
KATHERYNE M. MARTONE, ESQ.
The Legal Aid Society
Criminal Appeals Bureau
90 Church Street
New York, NY 10007

For the Respondent:
CHARLES J. HYNES, ESQ.
District Attorney
Kings County
By: VICTOR BARALL, ESQ.
Assistant District Attorney
350 Jay Street
Brooklyn, NY 11201-2908

BLOCK, District Judge:

Jose Rodriguez petitions for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254, claiming that the state trial court's decision to place a screen between his family and a state witness deprived him of a constitutionally required public trial under *Waller v. Georgia*, 467 U.S. 39, 48 (1984). For the reasons set forth below, the petition is denied.

BACKGROUND

Petitioner's conviction arose out of a "buy and bust" drug transaction. At petitioner's state court trial, the prosecution moved to close the courtroom to all spectators, including the petitioner's family, during the testimony of the undercover officer who had purchased drugs from the petitioner. The trial court conducted a *Hinton* hearing on the issue outside the jury's presence. *See People v. Hinton*, 31 N.Y.2d 71 (1972) (state court inquiry into factors justifying courtroom closure).

Undercover Officer 1068 was the sole witness at the hearing. The officer testified as follows: He had worked as an undercover police officer for approximately two and a half years. Tr. 562.[1] During that time he had been involved in both "buy and bust" operations and long-term operations. *Id.* at 563. He was involved in active, long-term narcotics investigations in the Bushwick area of Brooklyn and had "definite" plans to return to that area following his testimony. *Id.* at 563-64. He had open cases pending in the Kings County Supreme Court and had fears about his identity being revealed in court. *Id.* He had been threatened numerous times in the Bushwick

[1] "Tr." refers to the transcript of the trial, which includes the hearing.

area. *Id.* at 563. Specifically, "numerous subjects" of his had said "that if they [were] to find [him], they would kill [him]." *Id.* at 564. He had some "lost subjects," *i.e.*, buy and bust subjects who had evaded arrest in his open cases. *Id.* at 564-65.

The officer further testified that he would have fears for his safety if his identity were revealed to the defendant's family. *Id.* at 565. He explained that "if any of the defendant's family, relatives or friends see me, they'll be able to know I am a police officer and spread the word around." *Id.* On cross-examination by defense counsel, however, the officer admitted that the defendant had never threatened him, that he did not know the defendant's family, and that he had no reason to believe that the defendant's family was dangerous, involved in drug dealing or knew any drug dealers. *Id.* at 566-67.

After the hearing, defense counsel informed the court that it "[had] to make certain findings in order to close the courtroom." *Id.* at 572. In response, the court stated that "what the [officer] said seems to fit the parameters, within the principles set forth in the cases. He's going back into the neighborhood, expects to go back to the neighborhood, he's still working in the neighborhood, lost subjects, fear[s] for personal safety. It's well-founded, it would seem." *Id.*

The court then inquired as to which family members would be attending the undercover officer's testimony. Defendant's counsel stated that the defendant's mother might attend. The prosecution opposed the mother's attendance, explaining that "if she tells somebody and this undercover will be testifying back and forth on several days in this building and be in the area, she can point him out to somebody. There is a danger." *Id.* at 576. At that point, the court adjourned until the following day, stating "we'll concern ourselves with [the

issue] once more if and when there is a desire on the part of the defendant's mother to attend."*Id.* at 576-77.

The next day, defendant's mother and brother arrived at the courtroom to attend the trial. The court then issued its ruling. It first noted that the evidence at the hearing was "sufficient to warrant" the closure of the courtroom. *Id.* at 581. "The open question" for the court "was whether there should be an exception made for the . . . relatives of the defendant." *Id.* The court ruled that "the way to proceed . . . is to have, permit the relatives to be present and set up a screen so that the jury is in a position to observe the witness, but not the people in the spectator's section." *Id.* at 582. At that point, the following colloquy ensued between the court and defense counsel:

> MR. GOLDSTEIN: Judge, if that is the court's ruling, I'm going to ask my client's mother and brother to remain outside the courtroom. I fear that setting up a screen creates a substantial amount of prejudice to my client because the only thing that the jury can conclude is that the screen is being set up so that spectators can't see the witness and that means the witness is in danger.
>
> I think my client's mother and brother should be permitted entry without any screens.
>
> THE COURT: Yes, Mr. Goldstein, certainly any requested, appropriate and reasonable curative instructions [will] be given, should that, such a request, be made by the defense.
>
> MR. GOLDSTEIN: Judge, my opinion is that no instructions would be sufficient.
>
> And if that's the Court's ruling, I am going to ask my client's mother and brother to remain outside.

THE COURT: All right. Do you want to do that now?

MR. GOLDSTEIN: Yes.

. . . .

THE COURT: . . . . To make sure that the record is clear concerning the ruling made a moment ago, the use of the screen plus the curative instruction would seem to the court would be sufficient to protect the defendant's legitimate rights.

I . . . think given the state of the press and other media and events in the metropolitan area in recent months that very few are under the impression that being an undercover police officer is a course of conduct that is as safe as staying in bed after retirement in Florida.

Further, in light of the argument made by the Assistant District Attorney, the Court's impression [is] that a substantial cogent case can be made for the proposition that even on the basis of the testimony given and the state of the record and the fact that the undercover police officer will be moving in the neighborhood from the courthouse, at least a couple of days, presumably, the risks of recognition and identification while in transit would also be substantial. The defense has an exception.

Id. at 582-84. Thereafter, the trial resumed with the testimony of the officer, during which the courtroom was completely closed.

Defendant appealed his conviction to the Appellate Division, Second Department, which affirmed, explaining:

There is no merit to the defendant's contention that he was denied his right to a public trial because his

> family was, in essence, precluded from attending the trial as a result of the trial court's decision to use a screen to block their view of the testimony of the undercover officer. . . . (*see People v. Ramos*, 90 N.Y.2d 490; *People v. Martinez*, 82 N.Y.2d 436; *People v. Nicot*, 655 N.Y.S.2d 376).
>
> Moreover, the court ordered an alternative to closure with regard to the defendant's family, allowing them to remain in the courtroom during the officer's testimony provided that a screen was placed so as to block their view of the undercover officer (*see People v. Rivera*, 654 N.Y.S.2d 771). Accordingly, the defendant was not deprived of his right to a public trial.

People v. Rodriguez, 685 N.Y.S.2d 252 (2d Dept. 1999).

Leave to appeal to the New York Court of Appeals was denied. *People v. Rodriguez*, 93 N.Y.2d 978 (1999). On June 9, 2000, petitioner initiated this *habeas* proceeding.

DISCUSSION

Because this *habeas* petition postdates the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), AEDPA's revisions of 28 U.S.C. § 2254 govern this proceeding. AEDPA provides the guidelines under which a federal *habeas* court may grant a writ, based on a constitutional violation, to a state prisoner whose claims have been "adjudicated on the merits" by a state court. *See* 28 U.S.C. § 2254(d); *see also Williams v. Taylor*, 529 U.S. 362, 402 (2000). Pursuant to § 2254, *habeas* relief may not be granted unless the state court decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal

law, as determined by the Supreme Court of the United States," or (2) was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d); *see also Williams*, 529 U.S. at 402-11. "The Supreme Court has interpreted § 2254(d)(1) as giving independent meanings to both the 'contrary to' and 'unreasonable application' clauses." *Lainfiesta v. Artuz*, 253 F.3d 151, 154 (2d Cir. 2001).

A state court decision is "contrary to" clearly established federal law "if the state court applies a rule that contradicts the governing law set forth" in Supreme Court precedent or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives" at a different result. *Williams*, 529 U.S. at 405-06.

A state court decision involves an "unreasonable application" of Supreme Court precedent if it unreasonably applies a governing legal rule to the particular facts of a case. *See id.* at 409. This requires a *habeas* court to "ask whether the state court's application of clearly established federal law was objectively unreasonable," not whether the application was erroneous or incorrect. *Id.*; *see also Clark v. Stinson*, 214 F.3d 315, 320-21 (2d Cir.2000). In that respect, the standard to be applied "falls somewhere between merely erroneous and unreasonable to all reasonable jurists." *Jones v. Stinson*, 229 F.3d 112, 119 (2d Cir.2000) (internal citation and quotation marks omitted). The Second Circuit has cautioned that while "[s]ome increment of incorrectness beyond error is required . . . the increment need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Id.* (internal citations and quotation marks omitted).

First, the Court must decide if petitioner's claim meets § 2254(d)(1)'s requirement that the claim be based upon "clearly established Federal law" as determined by the Supreme Court. If not, the Court need go no further. *See Sellan v. Kuhlman*, 261 F.3d 303, 309 (2d Cir. 2001). Here, it is clear that *Waller*—which was decided by the Supreme Court in 1984—was clearly established in 1999, when the Appellate Division affirmed petitioner's conviction. *See Williams v. Artuz*, 237 F.3d 147, 152 (2d Cir. 2001). *Waller* holds that a courtroom closure will pass muster under the Sixth Amendment if a four-factor test, discussed below, is satisfied. *Waller*, 467 U.S. at 48; *Williams*, 237 F.3d at 152.

Since petitioner's claim is based on clearly established law, the Court next asks whether the state court's decision denying defendant's claim was "adjudicated on the merits" within the meaning of AEDPA, even though the decision did not explicitly refer to the claim as a federal claim or to relevant federal case law. *See Sellan*, 261 F.3d at 310-311 (adjudication on the merits means in accordance with federal law). If the state court decision was not "adjudicated on the merits" under federal law, a federal court has *de novo* review. *See id.*

The Second Circuit's decision in *Sellan* makes clear that the Appellate Division's decision denying defendant's federal claim was "adjudicated on the merits":

> For the purposes of AEDPA deference, a state court "adjudicate[s]" a state prisoner's federal claim on the merits when it (1) disposes of the claim "on the merits," and (2) reduces its disposition to judgment. When a state court does so, a federal habeas court must defer in the manner prescribed by 28 U.S.C. § 2254(d)(1) to the state court's decision on the federal claim—even if the state court does not explic-

> itly refer to either the federal claim or to relevant case law.

261 F.3d at 312. The Appellate Division's decision explicitly rejected defendant's claim that "he was denied his right to a public trial . . . ." *Rodriguez*, 685 N.Y.S.2d at 252. Therefore, it disposed of defendant's claim on the merits; judgment was accordingly entered. Even though the decision did not cite federal case law, the state cases it cited referred to and discussed federal law. *See, e.g,. Ramos*, 90 N.Y.2d at 495-96 (discussing *Waller*); *see also Morris v. Reynolds*, 264 F.3d 38, 45 (2d Cir. 2001) (noting that adjudication on the merits requirement was satisfied where state courts "in similar cases" referred to federal law). Accordingly, the Court concludes that the deferential standards of § 2254(d)(1) govern.

The remaining question is whether the state court's ultimate decision was an "unreasonable application" of clearly established Supreme Court precedent. *See Sellan*, 261 F.3d at 311-12,

The clearly established Supreme Court law governing courtroom closure has been articulated by the Second Circuit as follows:

> The Sixth Amendment guarantees every person accused in a criminal prosecution the right to a "public" trial. U.S. Const. amend. 6. That basic right has a long and distinguished history. *See In re Oliver*, 333 U.S. 257, 266-73 (1948) . . . .
>
> However, closure of a criminal trial courtroom may constitutionally occur under limited circumstances. The strict standards for closure were first enunciated by the Supreme Court, with varying formulations, in cases considering the First Amendment access rights of the press and the public . . . .

> These rigorous standards were explicitly applied to limitations on a defendant's Sixth Amendment right to a public trial in *Waller*, 467 U.S. at 47 . . . . *Waller* reformulated the standards for courtroom closure into a four-factor test:
>
> > [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced,
> >
> > [2] the closure must be no broader than necessary to protect that interest,
> >
> > [3] the trial court must consider reasonable alternatives to closing the proceeding, and
> >
> > [4] it must make findings adequate to support the closure.

Ayala v. Speckard, 131 F.3d 62, 68-69 (2d Cir. 1997) *(en banc)* (citations omitted).

Even under pre-AEDPA review, the state court's decision would likely be upheld as a correct application of *Waller*. *See, e.g., Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir. 1994) (suggesting that use of screen would be acceptable alternative to complete closure where defendant's family members seek to attend testimony of undercover officer); *Woods v. Kuhlmann*, 977 F.2d 74, 76-78 (2d Cir. 1992) (denying claim where members of defendant's family were excluded from court during government witness testimony).

Even if incorrect, it certainly cannot be concluded that the decision was unreasonable under post-AEDPA review. *See Williams*, 237 F.3d at 152-54 (denying claim where court limited courtroom access during testimony of key witness); *Sevencan v. Herbert*, 152 F.Supp.2d 252, 264-68 (E.D.N.Y. 2001) (denying claim where defendant's wife was excluded from courtroom during

testimony of undercover officer); *Durant v. Strack*, 151 F.Supp. 2d 226, 242-44 (E.D.N.Y. 2001) (denying claim where courtroom was closed during testimony of two undercover officers); *McCarthy v. Portuondo*, No. 98 CV 3726, 2001 WL 826702 (E.D.N.Y. May 25, 2001) (denying claim where defendant's mother was excluded from courtroom during testimony of undercover officer).

CONCLUSION

The petition is denied. The Court determines that a certificate of appealability will not issue because the petitioner has failed to make a substantial showing of the denial of a federal right. *See* 28 U.S.C. § 2253.

SO ORDERED

/s/ *FREDERIC BLOCK*
FREDERIC BLOCK
United States District Judge

Dated: Brooklyn, New York
October 22, 2001

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

96-00823
February 1, 1999

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

JOSE RODRIGUEZ,

Appellant.

M. SUE WYCOFF, New York, N.Y. (Katheryne M. Martone of counsel), for appellant.

CHARLES J. HYNES, District Attorney, Brooklyn, N.Y. (Roseann B. MacKechnie and Victor Barall of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Starkey, J.), rendered January 12, 1996, convicting him of criminal sale of a controlled substance in the first degree (three counts), criminal possession of a controlled substance in the second degree (two counts), and criminal possession of a controlled substance in the third degree (three counts), upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

There is no merit to the defendant's contention that he was denied his right to a public trial because his family was, in essence, precluded from attending the trial as a result of the trial court's decision to use a screen to block their view of the testimony of the undercover officer. The court properly exercised its discretion when it closed the courtroom during the trial testimony of the undercover police officer. The officer testified that he would be returning to the area where the arrest took place—an area where he had been threatened—and that if his identity was revealed that information could be disseminated in that area, resulting in his safety being jeopardized. The officer also testified that he had lost subjects and that he had never testified in open court before (*see, People v Ramos*, 90 NY2d 490, *cert denied sub nom. Ayala v New York*, 522 US 1002; *People v Martinez*, 82 NY2d 436; *People v Nicot*, 237 AD2d 310).

Moreover, the court ordered an alternative to closure with regard to the defendant's family, allowing them to remain in the courtroom during the officer's testimony provided that a screen was placed so as to block their view of the undercover officer (*see, People v Rivera*, 237 AD2d 178). Accordingly, the defendant was not deprived of his right to a public trial.

The defendant's sentence is not excessive (*see, People v Suitte*, 90 AD2d 80) .

SANTUCCI, J.P., JOY, ALTMAN and LUCIANO, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - CRIMINAL TERM - PART 15

INDICTMENT
#14710/94
T R I A L

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

JOSE RODRIGUEZ,

Defendant.

360 Adams Street
Brooklyn, New York

December 19, 1995

B E F O R E:

HONORABLE JAMES STARKEY
Justice and a jury

A P P E A R A N C E S:

OFFICE OF CHARLES J. HYNES, ESQ.
DISTRICT ATTORNEY, KINGS COUNTY
Attorney for the People
BY: MARK CIPOLLA, ESQ.
STEVEN MILLER, ESQ.
Assistant District Attorneys

DAVID GOLDSTEIN, ESQ.
Attorney for the Defendant-
Jose Rodriguez

MARGARET H. YOUMANS, R.P.R.
OFFICIAL COURT REPORTER

* * *

THE COURT: All right, the witness has retired.

MR. MILLER: Judge, the People request that the courtroom be sealed.

Your Honor, the undercover has stated that he's going to be back into the Bushwick area. He has received threats in the Bushwick before.

He feels if his identity is revealed in court, it could get back to the Bushwick area. It is not an unusual occurrence given the fact that the relatives of the defendant will be in the courtroom if it is not sealed.

He also stated there is lost subjects he has been involved in. If he discovers his identity, his safety can be in danger. It's not an unrealistic proposition, given the nature of his work regarding the long-term cases and the nature of the penalties involved when these people are caught.

For that reason, the People request that the courtroom be sealed.

THE COURT: Mr. Goldstein.

MR. GOLDSTEIN: Judge, while I will concede that there are certain circumstances under which the defendant has right to a public trial may be limited, I suggest to you that this is not one of those cases.

And I think that based on the officer's own testimony, there is no reason to close the courtroom.

He says that he was threatened by people in the Bushwick section of Brooklyn. And, obviously, he wasn't so afraid of these threats, which were based on people in Bushwick saying that they knew he was a police officer and, presumably, they told

everybody that they knew, he wasn't afraid to go back there because he went back.

So I think the whole argument is, basically, like a house of cards. If he was so afraid of people coming in here and seeing he is a police officer why, after—

THE COURT: Isn't there a definition of courage, Mr. Goldstein, being afraid and proceeding in the face of danger in any event?

MR. GOLDSTEIN: Judge, you have to make certain findings in order to close the courtroom.

I am not, I am not—

THE COURT: Mr. Goldstein, what the witness said seems to fit the parameters, within the principles set forth in the cases.

He's going back to the neighborhood, expects to go back to the neighborhood, he's still working in the neighborhood, lost subjects, fear for personal safety. It's well founded, it would seem.

MR. GOLDSTEIN: Judge—

THE COURT: In so far ass the nature of the work is concerned, if the identity as a police officer is revealed.

MR. GOLDSTEIN: Judge, maybe, I didn't hear him correctly. I didn't hear him say that he plans to go back to the neighborhood at any specific time.

He said I plan to go back to the neighborhood. That doesn't mean that there is something going on in that neighborhood right now.

The Court: I understood him to say that. Let's make sure there is no mistake. Call him back.

MR. GOLDSTEIN: As I said, I may have misheard. I didn't hear that.

THE COURT: I think he did, but there is no sense.

MR. MILLER: Judge, it's partially my fault because I know when he is going back in the neighborhood. And, in fact, he was. But for this trial, he'd be in that neighborhood right now.

THE COURT: Well, well, performing a service. Call him back.

MR. MILLER: In that regard I didn't want to reveal when he was going to be going back into that neighborhood.

COURT OFFICER: Ready for the witness?

THE COURT: Yes.

COURT OFFICER: Resume the stand. Watch your step on that cable.

UNDERCOVER POLICE OFFICER NO. 1068,, the witness herein, having been first duly sworn by the Clerk, was examined and testified as follows:

THE COURT: Detective, you stated earlier, did you, that there are ongoing investigations in which you are engaged in the Bushwick area?

THE WITNESS: Yes, sir.

THE COURT: Are those long-term, buy and busts, or both?

THE WITNESS: Long-term.

THE COURT: Are you engaged in buy and bust investigations any longer?

THE WITNESS: No, sir.

THE COURT: Were you also correctly understood to state that you expected to return in furtherance of the open investigation to the Bushwick area within the near future?

THE WITNESS: Yes, sir.

THE COURT: All right. Mr. Goldstein.

MR. GOLDSTEIN: No questions.

MR. MILLER: I have one other question for the undercover.

THE COURT: Go ahead.

Undercover Police Officer No. 1068-Direct/Miller

DIRECT EXAMINATION
BY MR. MILLER:

Q You said you were threatened by somebody in Bushwick. Is that person still out on the streets as far as you know?

A Yes, sir.

MR. MILLER: Okay, thank you.

THE COURT: All right, sir. You may step down.

(Whereupon, the witness is excused.)

THE COURT: Yes.

MR. GOLDSTEIN: Judge, I can tell by the tenure of this discussion that you plan on closing the courtroom.

I would suggest to you that there a case of the People against Martinez, 82, New York 2d, 436, 604 New York supplement 2d, 932 that states there is no real reason to exclude my client's family from the courtroom.

THE COURT: What family are we talking about?

MR. GOLDSTEIN: The only person who might possibly be here is his mother, that's it.

THE COURT: I guess, we'll worry about that if and when the mother presents herself and wishes to enter.

What do you have to say on that subject, if it should come about, Mr. Miller?

MR. MILLER: Judge, I would object to the mother being allowed into the courtroom.

The reason being, this is unlike a buy and bust, this is unlike a simple narcotics case. This man is literally facing, if convicted on all counts, 125 years, life in prison. It's 25 years for each A1 sale or A1 sale. That's a lot of pressure to be put under.

He knows that the People's main witness, the witness that can tie him to the sales, is this person and that's not a secret from anyone. It has been said in the courtroom and it's clear that the undercover's worries are that if one family member knows, even if it's not the mother. If she tells somebody and this undercover will be testifying back and forth on several days in this building and be in the area, she can point him out to somebody. There is a danger.

I don't know if it's going to happen or not going to happen. There is always a danger. The undercover's life in a case such as this is in jeopardy.

THE COURT: Well, we'll concern ourselves with that once more if and when there is a desire on the part of the defendant's mother to attend.

All right. I guess that will conclude proceedings for today. We'll adjourn until 10:30 tomorrow morning.

Same bail conditions.

(Whereupon, the trial was adjourned to December 20, 1995.)

* * *

IT IS HEREBY CERTIFIED THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF THE PROCEEDINGS.

/s/ *MARGARET H. YOUMANS, R.P.R.*
MARGARET H. YOUMANS, R.P.R.
OFFICIAL COURT REPORTER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - CRIMINAL TERM - PART 15

INDICTMENT
#14710/94
TRIAL

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

JOSE RODRIGUEZ,

Defendant.

360 Adams Street
Brooklyn, New York

December 20, 1995

BEFORE:

HONORABLE JAMES STARKEY
Justice and a jury

APPEARANCES:

OFFICE OF CHARLES J. HYNES, ESQ.
DISTRICT ATTORNEY, KINGS COUNTY
Attorney for the People
BY: MARK CIPOLLA, ESQ.
STEVEN MILLER, ESQ.
Assistant District Attorneys

DAVID GOLDSTEIN, ESQ.
Attorney for the Defendant-
Jose Rodriguez

MARGARET H. YOUMANS, R.P.R.
OFFICIAL COURT REPORTER

* * *

COURT OFFICER: The defendant's mother and brother are here.

THE COURT: All right. The record will now show that the interpreter is present.

All right. I'm not sure if the order was entered sealing the courtroom yesterday.

Was it?

MR. GOLDSTEIN: No, Your Honor.

THE COURT: All right. Well, the evidence received is ruled sufficient to warrant that relief.

The open question was whether there should be an exception made for the relative or relatives of the defendant.

It is now my understanding from what one of the court officers just said that the defendant's mother and brother are seeking entry,

MR. GOLDSTEIN: That's correct, Your Honor.

THE COURT: All right. Well, I think, maybe, the way to proceed is in accordance with as indicated to counsel earlier if this were to occur and that is to have, permit the relatives to be present and setup a screen so that the jury is in a position to observe the witness, but not the people in the spectator's section.

Mr. Goldstein.

MR. GOLDSTEIN: Judge, if that is the Court's ruling, I'm going to ask my client's mother and brother to remain outside the courtroom. I fear that setting up a screen creates a substantial amount of prejudice to my client because the only thing that the jury can conclude is that the screen is being setup so

that spectators can't see the witness and that means the witness is in danger.

I think my client's mother and brother should be permitted entry without any screens.

THE COURT: Yes, Mr. Goldstein, certainly any requested, appropriate and reasonable curative instructions be given, should that, such a request, be made by the defense.

MR. GOLDSTEIN: Judge, my opinion is that no instructions would be sufficient.

And if that's the Court's ruling, I am going to ask my client's mother and brother to remain outside.

THE COURT: All right. Do you want to do that now?

MR. GOLDSTEIN: Yes.

May I use the interpreter for a moment?

THE COURT: Yes. Has the jury been lined up?

COURT OFFICER: No.

THE COURT: All right. The defendant, interpreter and all attorneys are once more in the courtroom.

To make sure that the record is clear concerning the ruling made a moment ago, the use of the screen plus the curative instruction would seem to the Court would be sufficient to protect the defendant's legitimate rights.

I don't think given the state of the press and other media and events in the metropolitan area in recent months and years that very few are under the impression that being an undercover police officer is a course of conduct that is as safe as staying in bed after retirement in Florida.

Further, in light of the argument made by the Assistant District Attorney, the Court's impression that a substantial cogent case can be made for the proposition that even on the basis of the testimony

given and the state of the record and the fact that the undercover police officer will be moving in the neighborhood from the courthouse, at least a couple of days, presumably, the risks of recognition and identification while in transit would also be substantial. The defense has an exception.

Call the jury in, please.

* * *

(3)

No. 05-1472

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID MILLER,

Superintendent, Eastern Correctional Facility,

Petitioner,

v.

JOSE RODRIGUEZ,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

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August 30, 2006

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SUMMARY OF ARGUMENT

The Court of Appeals held quite unremarkably here that the State may not exclude a defendant's family from the testimony of an undercover police officer without a showing that their "exclusion was necessary to protect the State's overriding interest" in the safety and future effectiveness of the officer. Rodriquez v. Miller, 439 F.3d 68, 73-76 (2d Cir. 2006), citing Waller v. Georgia, 467 U.S. 39 (1984); 8a-15a. The State argues in its first issue that family can be excluded upon the same showing necessary to exclude the general public, State's Petition ("Pet.") at 14-23, but that issue, not argued below, is foreclosed by Waller's requirement that no closure be "broader than necessary" to advance the overriding state interest. Waller v. Georgia, 467 U.S. at 48. Thus, the first issue the State presents has already been resolved.

Accordingly, none of this Court's usual considerations for granting a writ of certiorari apply in this case, see Supreme Court Rule 10, and the State does not cite to any of them, see Pet. at 13-25, nor could it, since the decision of the Court of Appeals is not in conflict with a decision of this Court, the other Circuits, or any State Supreme Court in the United States.

Certiorari should also be denied because, as the State

acknowledges, it did not previously argue in the courts below the first question presented, "that if the general public properly could be excluded from the courtroom, it necessarily followed that the defendant's family could be excluded as well." Pet. at 20. The State's failure to do so strongly militates against this Court's review of a question the Court of Appeals was never given an opportunity to decide. See, e.g., Clingman v. Beaver, 544 U.S. 581, 597-598 (2005) (Supreme Court "ordinarily do[es] not consider claims neither raised nor decided below").

For similar reasons, this Court should decline to review the State's second question presented, "[W]hat measures may constitute reasonable alternatives to closure of the courtroom." Pet. at 23. As the State also acknowledges, Pet. at 24, the Court of Appeals did not reach this question. See e.g., Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157, 168-169 (2004) ("[w]e ordinarily do not decide in the first instance issues not decided below") (citation and quotation marks omitted). In light of the Court of Appeals' holding that "any type of closure excluding Rodriguez's family was improper here," the court did not "address 'alternatives to closure' under Waller's third prong." Rodriguez v. Miller, 439 F.3d at 76; 15a. Contrary to the State's view, there is no occasion for a court to consider an "alternative" to

closure if closure is not justified under Waller's test.

The bulk of the State's argument rests upon simple disagreement with the Court of Appeals' resolution of the merits of Mr. Rodriguez's claim based upon its application of the firmly-rooted principles of constitutional law set forth in Waller v. Georgia, 467 U.S. at 39, and In re Oliver, 333 U.S. 257 (1948), and the extensive, ancient authorities upon which those decisions rely. Rodriquez v. Miller, 439 F.3d at 73-76; 8a-15a. At bottom, the State's quarrel is with the Sixth Amendment, not the Court of Appeals.

Waller and In re Oliver leave no room for doubt that the very core of the Sixth Amendment public trial right is its protection of a defendant's interest in the presence of family and friends. As the State agrees, Waller sets forth a rule of general applicability. Pet. at 22. It prescribes a mandatory procedure for determining applications to close the courtroom that is realistic about exigencies that can arise and allows for the "rare" closing of proceedings. The Waller test does take care to avoid needlessly impinging upon the fundamental right to an open and public trial. Its stated requirement that any closure be tailored to the necessity at hand has been universally read to require the attendance of family members unless they pose an actual threat. See Waller v. Georgia, 467 U.S. at 48. Thus, Waller and its antecedents

provide all the guidance trial courts need in properly weighing the competing interests at stake, with the presumption in favor of an open proceeding attended, "at the very least," by a defendant's "friends, relatives and counsel." In re Oliver, 333 U.S. at 271-272.

In the end, the State's questions do not stem from any confusion in the law, but arise from a deep hostility to defendants' paramount right to the presence of loved ones at trial. Despite the State's view, American law is settled on this point, and this Court's scarce resources need not be expended to revisit it.

ARGUMENT

As to the First Issue, Review Should be Denied Because the State did not Argue it in the Court Below

The State acknowledges that, "[i]n the courts below . . . the State did not argue that if the general public properly could be excluded from the courtroom, it necessarily followed that the defendant's family properly could be excluded as well, without the State having to show any additional facts particular to the defendant's relatives." Pet. at 20. The State seeks to excuse its failure to do so on the ground that "[p]rior case law in the Second Circuit precluded the State from taking that position." Pet. at 20 n.2. Yet, the existence of authority against the State's position did not relieve the State of its obligation to make its argument and

give the Court of Appeals a chance to consider it. Accordingly, review should be denied. See, e.g., TRW, Inc. v. Andrews, 534 U.S. 19, 34 (2001) ("[w]e do not reach this issue because it was not raised or briefed below").

The Decision of the Court of Appeals was Correct

Under the clear rules of constitutional law set forth in Waller v. Georgia, supra, the trial court here was without authority, under the Sixth Amendment, to limit the family members' attendance at trial, absent a showing that their presence was "likely to . . . prejudice[]" "an overriding interest." 467 U.S. at 48. On neither the original nor the expanded record has the State ever demonstrated that the attendance of Mr. Rodriguez's mother or brother at his trial was "likely" to harm the undercover officer's safety or effectiveness. Id. For this fundamental reason, Mr. Rodriguez was denied a public trial by the wholly unjustified exclusion of his family from the key part of the prosecution's case. A writ of habeas corpus was correctly granted. See 28 U.S.C. §2254(d)(1).

The decision here involves a straightforward and correct application of Waller and In re Oliver that the Court need not review. The following evidence was adduced during the hearing before the trial court:

> On cross-examination, the Undercover admitted that Rodriguez had never threatened him and he had never

> seen Rodriguez, or any of his associates, in possession of a gun. Additionally, the Undercover conceded that he did not know any of Rodriguez's relatives, and had no reason to believe that Rodriguez's mother was involved in drug dealing. Finally, the Undercover stated that he had never been directly threatened, but, instead, had only learned of potential threats via conversations with informants.

Rodriguez v. Miller, 439 F.3d 68, 70-71 (2d Cir. 2006); 4a.

Although the State was given an opportunity to adduce additional evidence after remand to the District Court, it failed to establish, even then, that either of Mr. Rodriguez's family members presented a risk to the undercover police officer's safety or effectiveness. The only additional evidence the State adduced regarding Mr. Rodriguez's mother and brother was their addresses at the time of trial.[1]

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[1]In light of its holding granting Mr. Rodriguez relief, the Court of Appeals did not reach Mr. Rodriguez's argument that the District Court erred by expanding the record on remand to include information regarding his family members' addresses. Rodriguez v. Miller, 439 F.3d at 76 n.3; 15a. This record difficulty is an additional reason why review should be denied.

As Mr. Rodriguez argued below, the District Court's decision to expand the record was an abuse of its discretion under the habeas corpus rules and related caselaw and violated the statute's directive that the reasonableness of a state court's factual determination is to be assessed "in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(2).

In this regard, there is no basis whatsoever for the State's present contention that "it was assumed in the trial court, . . ., that the defendant's relatives indeed lived within or in close proximity to, the neighborhood of the

(continued...)

In correctly determining that the state courts unreasonably applied Waller in effectively excluding Mr. Rodriguez's family from the courtroom, the Court of Appeals noted:

> [T]he trial court made no findings with respect to the mother or brother. Furthermore the Undercover had never encountered nor did he even know anyone in Rodriguez's family. And there was no indication that either Rodriguez's mother or brother was dangerous, knew of his criminal activity, or was familiar with any of his associates.

Rodriguez v. Miller, 439 F.3d at 74 (emphasis in original); 11a-12a.

The State disagrees with the Court of Appeals' conclusion that the mere fact that Mr. Rodriguez's mother and brother lived in some "proximity" to the charged transactions was, by itself, "not enough to establish a threat to the Undercover's safety or efficacy." Rodriguez v. Miller, 439 F.3d at 75; 12a. While the State repeatedly asserts that Mr. Rodriguez's mother and brother lived in the "neighborhood" of the officer's continuing activities, see Pet. 20-22, the likelihood of an encounter was actually much smaller than that

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[1](...continued)
undercover officer's continuing operations." Pet. at 21. Evidence regarding the addresses was not presented to the trial court, and, as the Court of Appeals found, "the trial court made no such finding." Rodriguez v. Miller, 439 F.3d at 75; 12a.

term suggests. The officer testified that he was returning to Bushwick, Brooklyn. Rodriquez v. Miller, 439 F.3d at 70; 3a. By no stretch does "neighborhood" fairly describe Bushwick, a large and densely-populated urban area of more than one hundred thousand residents.

The State complains, without citation to authority, that Waller does not require a showing that "the defendant's relatives more likely than not will compromise the officer's safety or effectiveness." Pet. at 21.[2] The State does not explain why. Waller's plain language requires a demonstration that the open courtroom is "likely" to prejudice an "overriding interest." Waller v. Georgia, 467 U.S. 39, 48 (1984).

The Court of Appeals did not, as the State contends, "in effect substitute[ ] its own independent authority for that of the state courts." Pet. at 22. Rather, the court determined that, in relieving the State of any burden of demonstrating that the family members presented a risk, the state courts unreasonably applied this Court's precedent. Rodriquez v. Miller, 439 F.3d at 76; 15a. In carefully considering and rejecting each of the State's arguments, the Court of Appeals

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[2]The State's attempt to lessen the required showing, to something less than "more likely than not" Pet. at 21, constitutes a telling concession regarding the weakness of its showing.

concluded that the alleged risk to the undercover officer's safety and effectiveness rested, not on an actual showing, but "conclusory statements," "conjecture," and a "naked assertion" of fear. Rodriquez v. Miller, 439 F.3d at 74-75; 11a-12a, 14a.

With no proof of a real risk in this case, the State argues that no such showing is necessary, on the view that it can bootstrap upon the factual showing that justified exclusion of the general public to exclude Mr. Rodriguez's family. See Pet. at 13-25. In support of this notion, the State posits that family members' familial relationship, standing alone, creates a presumption of dangerousness. See Pet. at 18-19. Yet, the State offers no empirical support for this anti-family claim and can point to no place in Sixth Amendment caselaw where it was ever accepted.

The Court of Appeals was correct to conclude that prejudice against the attendance at trial of family members is inconsistent with the Sixth Amendment. The State identifies no conflicting decision by this Court, another United States Court of Appeals, or highest State Court. See Supreme Court Rule 10(a) & (c). Accordingly, review should be denied.

Absent a Showing of Necessity, a Defendant's Sixth Amendment Right to a Public Trial Includes the Attendance of Family Members, Even Where the General Public May Be Excluded

The State claims that this Court has never recognized that family members should be treated differently than the general public in determining who, out of necessity, may be excluded from a defendant's trial, and that a "controversy" surrounding this issue "derives from dicta in this Court's decision in In re Oliver, 333 U.S. 257 (1948)." Pet. at 16. In fact, this Court's discussion in In re Oliver amounts to nothing more or less than a recapitulation of the historical underpinnings of the Sixth Amendment.

As this Court explained, "This nation's accepted practice guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before settlement of our land as an accompaniment of the ancient institution of jury trial." In re Oliver, 333 U.S. at 266. This Court observed: "In giving context to the constitutional and statutory commands that an accused be given a public trial, the state and federal courts have differed over what groups of spectators, if any, could properly be excluded from a criminal trial." In re Oliver, 333 U.S. at 271. Nonetheless, "without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel

present, no matter with what offense he may be charged." Id. In its review of relevant authorities, this Court found that "there has never been any intimation that all of the public, including the accused's relatives, friends, and counsel, were barred from the trial chamber." In re Oliver, 333 U.S. at 272 (collecting authorities).

Despite the State's efforts to cast In re Oliver as the source of confusion on the subject, see Pet. at 16-18, this Court's discussion and citation to authorities make clear that the defendant's interest in the attendance of his family and friends is at the core of the Sixth Amendment right. See In re Oliver, 333 U.S. at 272 n. 29, citing with approval State v. Beckstead, 88 P.2d 461, 462 (Utah 1939) (the "order excluding all spectators including friends and relatives" was "fundamental" error), and People v. Hall, 51 App. Div. 57, 64 N.Y.S. 433 (4th Dept. 1900) (right to public trial correctly applied where the trial court excluded the general public but "was insistent in stating that any friends of the defendant would be admitted"). At the time of In re Oliver, there had "never been any intimation" that the type of closure the State now seeks to routinize - the barring from the courtroom of all the public "including the accused's relatives, [and] friends" - would be tolerated. In re Oliver, 333 U.S. at 272.

As the State acknowledges, "some" courts have "understood

properly excluded from the courtroom, the defendant nonetheless, as a general rule, has the right to have his family attend the trial." Pet. at 17 (citing authorities). Those courts, including the New York Court of Appeals, are correct. Given its derivation, Waller's four-part test clearly incorporates and applies this Sixth Amendment principle to the various situations trial courts face. See Waller v. Georgia, 467 U.S. at 48.

The State cites a single case, Martin v. Bissonette, 118 F.3d 871 (1st Cir. 1997), as evidence of conflicting decisions regarding the attendance of defendants' family members at trial. Pet. at 17-18. The State's reliance on Martin is misplaced. While Martin rejected the defendant's argument that In re Oliver required application of a "heightened" standard "whenever a court excluded a family member from a criminal defendant's trial," even where he or she poses a threat, see Martin v. Bissonette, 118 F.3d at 875-876, the State reads too much into the court's language, see Pet. at 17-18.

By rejecting a "heightened" standard for family, Martin did not, as the State suggests, jettison the requirements that the State establish that the family presents an actual risk and that the closure be no broader than necessary to protect

the State's interest. See Pet. 17-18. The court explained:

> Nothing in Oliver . . . suggests that a trial court need go beyond the already stringent requirements of Waller before removing a defendant's family from the courtroom. Those requirements - including the existence of an overriding interest that is likely to be prejudiced in the absence of closure and that the closure must be no more expansive than necessary to protect that interest - adequately safeguard a defendant's interest in permitting his family to be present in the courtroom.

Martin v. Bissonette, 118 F.3d at 876. Applying the Waller test, the court determined that, where the defendant, his brother, his girlfriend, and an unidentified woman had intimidated the witness, the State had justified exclusion of the family "to end this widespread reign of harassment and secure the witness' accurate testimony." Martin v. Bissonette, 118 F.3d at 875.

Here, unlike in Martin, the State did not demonstrate any necessity for the family's exclusion. Instead, the State asks to be excused of its burden and invites "this Court to hold, consistent with the teachings of Waller and Oliver, that whenever, in order to protect the safety and effectiveness of an undercover police officer, closure of the courtroom to the general public is warranted, then closure of the courtroom to the defendant's relatives is also warranted." Pet. at 18. As explained above, such an automatic-closure rule for family

members is repugnant to In re Oliver and the venerable authorities upon which it relies. See In re Oliver, 333 U.S. at 266-273 (and authorities cited therein).

Likewise, the State's proposal to treat family members and strangers the same under the Sixth Amendment cannot be reconciled with the strict test this Court promulgated in Waller, which heavily cites and quotes from Oliver. See Waller v. Georgia, 467 U.S. at 45-48. The State's argument that Waller permits a rule of indifference to family members, see Pet. at 13-25, ignores Waller's presumption of openness, the care it requires trial courts to take in narrowly ordering closure only when necessary, and its stated requirement that the closure order be no broader than necessary and supported by adequate findings. See Waller v. Georgia, 467 U.S. at 45-48. Incorporating the principles set forth in In re Oliver, Waller's requirements protect the defendant's right to a public trial attended "at the very least" by a defendant's "friends, relatives, and counsel." In re Oliver, 333 U.S. at 271-272.

To the extent that the State is requesting some sort of exception to Waller for cases involving undercover police officer testimony, see Pet. at 18-23, its proposed exception is so vast that it swallows the rule. According to the State, the "rationale for closing the courtroom to the general public

applies with equal force, if not greater force to the defendant's family." Pet. at 18. The State's conclusion is based, not upon any shred of empirical evidence, but upon the speculation that the family members "may well harbor anger toward the officer" and therefore "are among the persons most likely to point him out to other parties with an interest in harming him or interfering with his undercover police work." Pet. at 19 (emphasis in original).

The Sixth Amendment right to a public trial applies to all criminal cases. And, this Court recognized a defendant's right to the presence of his family "no matter with what offense he may be charged." In re Oliver, 333 U.S. at 272. It is possible to speculate, in every case, no matter the charge, or where the relatives happen to live, that the family may be hostile to the prosecution's witnesses. On the State's expansive theory, family members always pose a theoretical risk to the State's interest, and they may be excluded from the courtroom based on their relationship to the defendant alone.

The State maintains that its sweeping generalization is permissible because:

> [t]he prosecution generally knows nothing about the background, character, or day-to-day activities of the various relatives of the defendant who may seek to attend the trial during the undercover officer's testimony . . .

Pet. at 21-22. The State's complaint about the rarity of the case in which a defendant's relatives may be properly excluded is no reason to lessen the constitutionally-required showing. This Court "has made clear that the right to an open trial may give way in certain cases to other rights or interests," but "such circumstances will be rare." Waller v. Georgia, 467 U.S. at 45.

The State utterly fails to perceive what is so special about the presence of family:

> [T]here is nothing about the presence in the courtroom of a defendant's family qua family that particularly serves to advance any of [the Sixth Amendment's] goals. Therefore, if the circumstances of a case justify closing the courtroom to the general public, then there is nothing in the Public Trial clause that suggests that the defendant nevertheless has a right to his family's presence in the courtroom.

Pet. at 19-20.

For enlightenment, the State need look no further than this Court's precedent. In In re Oliver, this Court observed:

> Even those who deplore the sensationalism of criminal trials and advocate the exclusion of the general public from the courtroom would preserve the rights of the accused by requiring the admission of the press, friends of the accused, and selected members of the community.

In re Oliver, 333 U.S. at 272 n. 29, citing, inter alia, Radin, "The Right to a Public Trial," 6 Temple Law Quarterly

381, 394-395 (April 1932).

In both Waller and In re Oliver, this Court quoted Justice Cooley's treatise, which emphasizes the benefit of attendance by "interested spectators":

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and the importance of their functions . . .

See Waller v. Georgia, 467 U.S. at 46, quoting Gannett v. DePasquale, 443 U.S. 368, 380 (1979) (quoting In re Oliver, 333 U.S. at 270 n. 25, in turn quoting T. Cooley, Constitutional Limitations, p. 647 (8th ed. 1927)).

Cooley's treatise, in turn, marshals the relevant authorities, which consider whether the defendants received a public trial in light of the attendance of their lawyers, families, and other spectators "interested" in the case. As these cases demonstrate, trial courts historically allowed "interested" individuals, such as family members, to remain, even when the general public was excluded out of concern for sensitive witnesses, to maintain order in the courtroom, or to protect public morals. See Cooley, Constitutional Limitations, at 647 n.7 (8th ed. 1927), citing, inter alia, People v. Kerrigan, 73 Cal. 222, 14 P. 849 (1887) (the defendant's right to a public trial was not violated by a

closure order which "allowed to remain" "officers of the court, reporters of the public press, friends of the defendant, and persons necessary for her to have on said trial"); Grimmett v. State, 22 Tex. App. 36, 2 S.W. 631 (Ct. App. 1886) (closure order did not exclude "any person who could have been of any service to the defendant in his trial").

Likewise, the federal authorities upon which this Court also relied in Waller and In re Oliver consider whether, at the very least, the defendant's friends, relatives, or other individuals with an interest in the case were admitted. See Waller v. Georgia, 467 U.S. at 46, citing Douglas v. Wainwright, 714 F.2d 1532, 1537 (11th Cir. 1983) (upholding trial court's order which permitted members of the defendant's family to remain); In re Oliver, 333 U.S. at 271 n. 27, citing Reagan v. United States, 202 F. 488, 490 (9th Cir. 1913) (the defendant was not "deprived of the presence, aid, or counsel of any person whose presence might of been of advantage to him").

In People v. Hall, supra, also cited by this Court in In re Oliver, 333 U.S. at 272 n. 29, the court graphically illustrated the difference, which the State does not believe exists, between a trial attended by members of the general public and one at which a defendant's relatives and friends

are present:

> In a time of political or local excitement, if the trial judge permitted the court room to be packed exclusively with men opposed to the defendant on trial, the trial would not be public in fairness to the defendant. Every seat and all the standing room might be occupied, but the character of the spectators present, and the friendliness to the accused of those who failed to gain admittance, perhaps through the connivance of the court are to be considered in deciding whether the rights of the defendant have been trampled upon.

People v. Hall, 51 App. Div. at 57, 64 N.Y.S. at 436-437.

For these reasons, the State's proposed questions stem from a fundamental misapprehension of the nature of the right to a public trial. The petition for a writ of certiorari should be denied.

As to the Second Issue, Review Should be Denied Because It was Not Decided by the Court of Appeals and Is Academic on the Facts of this Case

The State asks this Court to decide "what measures may constitute reasonable alternatives to closure of the courtroom" and argues that it is an open question whether a trial court may entirely circumvent Waller and infringe on a defendant's Sixth Amendment right, so long as its order diminishing or disparaging the right to family members' attendance is something short of ordering their absolute exclusion under all circumstances. Pet. at 23-25.

As noted above, the Court of Appeals did not reach the

issue of alternatives to closure, observing that a "screen was never actually used" in this case, "thus making this a less than ideal posture in which to decide where a screen falls on the spectrum of closures." Rodriguez v. Miller, 439 F.3d at 76; 15a. The court further noted that its "ruling that any type of closure excluding Rodriguez's family was improper" made it unnecessary to address "alternatives to closure." Id.; 15a. Accordingly, because the court correctly declined to address the issue of alternatives to closure, which is purely hypothetical on the facts of this case, review should also be denied as to the State's second question presented. See Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. at 168-169 (declining to reach issue which was not decided below).

Because any Exclusion of the Family Members was not Justified, There is No Need to Consider and Impose a "Reasonable Alternative" to Closure

Under Waller, to overcome the Sixth Amendment's strong presumption of a public proceeding, the State must advance an interest justifying the exclusion sought and show that this interest is "likely to be prejudiced" by the family's attendance. Waller v. Georgia, 467 U.S. at 48. In this case, the State advanced no interest requiring the exclusion of Mr. Rodriguez's family. The State court excused the failure to comply with Waller's requirement, on the view that the trial

court offered an "alternative to closure with regard to [Mr. Rodriguez's] family . . . ." People v. Rodriquez, 258 A.D.2d 483, 685 N.Y.S.2d 252 (2d Dept. 1999). Yet, this Court has recognized no such exception to Waller. As the Court of Appeals correctly determined, the state court's decision constituted an unreasonable application of this Court's authority. Rodriquez v. Miller, 439 F.3d at 73-76; 8a-15a.

The State's theorizing that a trial court may avoid Waller's requirements and still restrict the attendance of family members is unsupported by any authority whatsoever. See Pet. at 24-25. With a single exception, none of the cases the State cites actually hold that the four prongs of Waller are inapplicable, as the State urges here, where an "alternative" to closure is imposed. See United States v. Lucas, 932 F.2d 1210, 1217 (8th Cir. 1991) (government established "overriding interests"); State v. Schultzen, 522 N.W.2d 833, 836 (Iowa 1994) (same); State v. Suarez, 867 S.W.2d 583, 587 (Mo. Ct. App. 1993) ("need for safety of the officer and security for the ongoing undercover investigation" were both "legitimate reasons for the trial court's action in screening the witness"). The exception, People v. Tocco, 258 A.D.2d 374, 685 N.Y.S.2d 699 (1st Dept. 1999), is an intermediate New York State appellate court decision that is in conflict with the later decision of that State's highest

court, and which is contemporaneous to the vacated decision here. In People v. Jones, 96 N.Y.2d 213, 219-220, 726 N.Y.S.2d 608, 613 (2001), the New York Court of Appeals held correctly that, in choosing an "alternative to closure," a trial court does not, and cannot, circumvent Waller: "When the procedure requested impacts on a defendant's right to a public trial, nothing less than an overriding interest can satisfy constitutional scrutiny." Id.

Without Waller's requirements to fetter a trial court, the State's proposed rules would permit courts to routinely restrict a defendant's right to his family's attendance when the "State has presented testimony at a closure hearing sufficient to justify closure of the courtroom to the general public." Pet. at 24-25. In stark contrast, under the governing caselaw, a trial court's authority to restrict a defendant's public trial rests on the "necessity" for a closed one. Waller v. Georgia, 467 U.S. at 45 (requiring findings that "closure is essential"). Nonetheless, on the State's view, in every case where the general public is properly excluded, the trial court may deny the defendant his right to his family's presence by ordering a screen, the inherent prejudice of which can only be avoided by their leaving the courtroom. See People v. Hall, 51 App. Div. at 57, 64 N.Y.S. at 435 (the court "cannot gain by indirection what it lacks

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the authority to do directly"); see also Ayala v. Speckard, 131 F.3d 62, 71-72 (2d Cir. 1997) (trial courts should not sua sponte consider alternatives to closure such as the use of a screen because this measure "risks implying to the jury that the family or friends of the defendant in attendance are likely to be dangerous" and "pose[s] substantial risks to a fair trial for the defendant").

The State's approach also ignores the fact that the term "alternative to closure" has a specific meaning in the caselaw. Under Waller, an "alternative to closure" may be considered only where the State has shown that closure is, in the first instance, justified. See Waller v. Georgia, 467 U.S. at 48 (the "trial court must consider reasonable alternatives to closing the proceeding"); People v. Jones, 96 N.Y.2d at 219-220, 726 N.Y.S.2d at 613 ("overriding interest" required to justify "limited and conditional restriction on access to the courtroom"). This step in the Waller procedure ensures that, even where closure is fully justified, the attendance of a defendant's family is secured to the greatest extent possible.[3]

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[3]As the jurisprudential antecedents of Waller make clear, the requirement of a court considering less restrictive alternatives to the complete closure of a public proceeding before ordering closure derives from the general constitutional principle that fundamental rights, i.e. public access under the First Amendment or a public trial under the (continued...)

By unmooring the term from its legal context, the State seeks to achieve the opposite result: A defendant's family may be effectively excluded from the courtroom for no particular, real reason at all; and such exclusion need not be "essential" to protect an "overriding interest" from suffering "likely prejudice," as the controlling constitutional law requires. See Waller v. Georgia, 467 U.S. at 45-46, citing Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510 (1984), and citing In re Oliver, 333 U.S. at 270, citing, e.g., People v. Hall, 51 App. Div. at 57, 64 N.Y.S. at 433. Far from being an open question, such gratuitous infringements upon the fundamental right to a public trial are categorically foreclosed under the Sixth Amendment.

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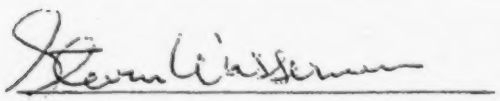
[3](...continued)
Sixth Amendment, should only be abridged to the extent necessary. Hence, the requirement of considering a "least restrictive alternative" or "reasonable alternative" to closure before closure is ordered. As Justice Marshall explained in Press-Enterprise, supra, "prior to issuing a closure order, a trial court should be obliged to show that the order in question constitutes the least restrictive means available for protecting compelling state interests." 464 U.S. at 520. (concurring opinion) (emphasis in original). Such an analysis is wholly inapplicable where, as here, exclusion of the family is not justified in the first instance.

CONCLUSION

FOR THE ABOVE REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,



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IN THE

Supreme Court of the United States

DAVID MILLER, Superintendent, Eastern Correctional Facility,

Petitioner,

—v.—

JOSE RODRIGUEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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September 14, 2006

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

In opposing the petition for a writ of certiorari, the defendant advances three meritless contentions. First, defendant contends that the first of the questions presented by the State was not raised by the State in the court below, and that neither of the questions presented by the State was decided by the court below. That set of circumstances, the defendant argues, strongly militates against review by this Court. Second, the defendant contends that the resolution of this case may depend on evidence that was not before the state courts, and that the district court abused its discretion in permitting the State to supplement the record with that new evidence. Finally, the defendant contends that the Second Circuit's decision, holding that the defendant's family was improperly barred from the courtroom during the testimony of an undercover officer, was merely an unexceptional application of well-established and venerable case law that allegedly has recognized the defendant's right to have his family present during his trial. As shown below, the defendant's three contentions are incorrect, and the defendant has failed to show that either of the two questions raised by the petition is unworthy of this Court's review.

1. The petition for a writ of certiorari in this case presents two questions. Through the first question, the State asks this Court to hold that whenever, consistent with the Sixth Amendment, the general public has been excluded from the courtroom for the protection of a testifying undercover police officer, then the defendant's family

also may be excluded from the courtroom. *See* Petition ("Pet.") at 18-20. The defendant maintains, with respect to the first question, that this Court should not hear this case because the State did not argue below what it is asking this Court to hold, and because the Second Circuit did not decide the issue. *See* Brief in Opposition ("Br. Opp.") at 1-2, 4-5.

It is true that in the court below, the State did not make the argument that it is advocating before this Court. However, as explained in the petition for certiorari, prior case law in the Second Circuit precluded the State from making that argument. *See* Pet. at 20 n.2. Indeed, for the State to have argued in the Second Circuit that a defendant's right to the presence of his family at his trial is no greater than his right to the presence of the general public—and thus, to have argued that the Second Circuit should overrule a prior decision of that court (*see Vidal v. Williams*, 31 F.3d 67 [2d Cir. 1994], *cert. denied*, 513 U.S. 1102 [1995])—the State would have had to seek en banc consideration of this case. *See Nicholas v. Goord*, 430 F.3d 652, 659 (2d Cir. 2005) (a prior panel decision of the Second Circuit must be followed unless the rationale for that decision has been overruled by the Supreme Court or by the Second Circuit sitting en banc); *BankBoston, N.A. v. Sokolowski*, 205 F.3d 532, 534 (2d Cir. 2000) (same).

In any event, although this Court generally will not review an *issue* that was not raised in the lower courts, it always has allowed the parties to make new *arguments* in support of claims properly presented below. *See, e.g., Harris Trust and Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 n.2 (2000); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379-80 (1995); *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992). In this case, the defendant claimed in the court below that

the exclusion of his family from the courtroom during the undercover officer's testimony violated his right to a public trial. The State argued that when, as in this case, the defendant's relatives live within, or in close proximity to, the neighborhood to which the officer will be returning in an undercover capacity, then the closure of the courtroom to his relatives—along with the rest of the public—does not violate the Sixth Amendment. Thus, the issue of whether the exclusion of the defendant's relatives from the courtroom violated the Sixth Amendment was squarely presented below, and the State is merely making a new and broader argument in this Court in support of the State's position that the exclusion was proper.

The defendant's contention that the Second Circuit did not *decide* the first question presented by the State is incorrect. In rejecting the State's narrower claim that the defendant's relatives were properly barred from the courtroom because they lived in or near the neighborhood to which the undercover officer would be returning, the Second Circuit necessarily (albeit implicitly) rejected the State's more far-reaching claim, made here, that whenever the general public may be excluded from the courtroom for the protection of the officer, the family, too, may be excluded.

The defendant's contention that the Second Circuit did not decide the second question presented by the State (*see* Br. Opp. at 19-20) is also incorrect. Through the second question, the State asks this Court to hold that the use of a screen, which would enable spectators to remain in the courtroom but would prevent them from seeing the undercover officer as he testifies, constitutes a reasonable alternative to closure, and to hold that when the trial court devises a reasonable alternative to closure, the four-part test of *Waller v. Georgia*, 467 U.S. 39

(1984), which governs *closures* of the courtroom, does not apply.

The State made these same arguments in the court below. The Second Circuit explicitly rejected the State's argument that the *Waller* test did not apply to alternatives to closure, and hence, did not reach the question of whether the utilization of a screen constituted a reasonable alternative to closure (Appendix ["App."] at 14a-15a). 439 F.3d at 76. In holding that a record justifying the complete closure of the courtroom is a prerequisite to the consideration of alternatives to closure, the Second Circuit plainly rebuffed the argument advanced by the State and reiterated here: that a different test applies to alternatives to closure (instances in which the courtroom is not closed) than to closures. Thus, this case provides this Court with an opportunity to address that important question (in the event that the Court does not decide the case in the State's favor on the basis of the first question presented).

2. The defendant also argues that this case is inappropriate for review by this Court because, according to the defendant, resolution of the case may depend on evidence that was not before the state courts and that the district court allegedly should not have permitted the State to present for the first time in the habeas proceeding. *See* Br. Opp. at 6 n.1. However, both of the questions presented by the petition for certiorari can be answered without reference to the evidence adduced for the first time in the district court, which evidence concerned where the defendant's mother and brother had been residing at the time of the defendant's trial.

This Court may address the State's first argument, that if the general public may be barred from the courtroom, then the defendant's family may be barred as well, without reference to any evidence adduced in the district

court. If this Court were to reject that argument, but accept the State's alternative argument that the defendant's relatives may be barred at least when it is shown that they live in or near the area to which the undercover officer will be returning, then this Court—if it deemed the record made in the state court inadequate—could remand this case to the Second Circuit for it to rule on the issue that that court left unresolved: whether the district court appropriately received the new information presented by the State. *Cf. Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006) (remanding companion case, *Hammon v. Indiana*, to Indiana Supreme Court for determination of unresolved issue).

Likewise, without reference to the evidence adduced in the district court, this Court could resolve the methodological issue underlying the second question: whether or not full satisfaction of the four-part *Waller* test is a prerequisite to consideration of alternatives to closure. The evidence adduced in the district court is also unnecessary for the resolution of the question of whether the use of a screen is a reasonable alternative to closure. In any event, again, if the defendant's entitlement to habeas relief ultimately depended on the new evidence presented to the district court, then this Court, after announcing the applicable rules of law, could remand this case to the Second Circuit for it to rule on the question that that court left open.

Thus, the fact that the district court permitted the State to supplement the record is no impediment to this Court's consideration of this case.

3. Finally, the defendant confidently asserts that "*Waller* and *In re Oliver* [333 U.S. 257 (1948)] leave no room for doubt that the very core of the Sixth Amendment public trial right is its protection of a defendant's interest in the presence of family and friends"

(Br. Opp. at 3), and he maintains that the Second Circuit's decision, holding that the defendant's family was improperly barred from the courtroom during the testimony of the undercover officer, was merely an unexceptional application of this well-established and venerable principle. The defendant is incorrect.

First, as the Second Circuit itself has recognized, this Court's observation in *Oliver* about an accused's entitlement to the presence of friends and relatives at his trial (333 U.S. at 271-72; *see* Pet. at 17) is dictum.[1] *See Yung v. Walker*, 341 F.3d 104, 110 (2d Cir. 2003); *see also Sevencan v. Herbert*, 342 F.3d 69, 74 (2d Cir. 2003), *cert. denied*, 540 U.S. 1197 (2004). Moreover, *Oliver*—which overturned a conviction following a trial that was held in complete secrecy—did not announce any kind of a test for determining when, if ever, a courtroom may be closed to the public; the Court in *Oliver* merely held that the public trial right of the petitioner in that case had been violated by the secret trial to which he had been subjected. It was not until *Waller* that this Court provided a framework for adjudicating Sixth Amendment public trial claims (*see* 467 U.S. at 48), and this Court has never applied the *Waller* test in the context of a court's exclusion of a defendant's family from the courtroom.

The defendant's contention that, since time immemorial, the courts have recognized that an accused's right to have his family and friends attend his trial is the

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[1] Under 28 U.S.C. § 2254(d)(1), a state prisoner is not entitled to habeas relief unless the state courts' adjudication of the claim at issue was "contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by this Court. "[C]learly established Federal law" is limited to this Court's holdings and does not include dicta. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000).

essence of the Sixth Amendment public trial right (*see* Br. Opp. at 11), is misleading, because the cases that appear to support that contention all predate the modern era of Sixth Amendment jurisprudence, which was inaugurated by *Waller*. Indeed, in the cases cited by the defendant (two of which also are cited in *Oliver*), the courts seem to have upheld the exclusion of the general public from the courtroom, under circumstances that almost certainly would not be permitted today, because the defendant's friends or family were not excluded.[2] But these cases simply do not address the question of whether, in a case in which the general public is *properly* excluded from the courtroom for the safety of a witness, the State must make some additional showing to justify the exclusion of the defendant's family. Moreover, *Waller* itself does not address that question.

Second, the defendant is incorrect in his claim that the Second Circuit's determination in this case involved merely a straightforward application of the *Waller* test, and, indeed, that the outcome was all but inevitable. The test announced in *Waller* is stated in sufficiently general terms that the conclusion of the Second Circuit—that the

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[2] *See People v. Hall*, 51 A.D. 57, 59, 64 N.Y.S. 433 (App. Div. 1900) (given the "filthy character" of the testimony that would be presented, it was proper, for the protection of public morals, for the court to bar everyone but designated friends of accused from courtroom); *People v. Kerrigan*, 73 Cal. 222, 14 P. 849 (1887) (defendant's use of profane language justified closure of courtroom to public, in order to preserve decorum; defendant's friends and other specified groups were exempted from closure order); *Grimmett v. State*, 22 Tex. Ct. App. 36, 2 S.W. 631 (Ct. App. 1886) (most of public excluded to relieve embarrassment of witness, but closure order exempted anyone who could have been of service to the accused); *cf. State v. Beckstead*, 96 Utah 528, 88 P.2d 461 (1939) (order excluding all spectators, which was subsequently modified to exempt relatives of the accused, denied the accused his right to a public trial, since relatives were barred during a portion of trial).

state courts had unreasonably applied *Waller* in upholding the exclusion of the defendant's mother and brother from the courtroom, *see* 28 U.S.C. § 2254(d)(1)—far from being unavoidable, is unsupportable.

Indeed, the Second Circuit's own prior decisions show that the defendant's assertion, that it is well understood that an accused has a virtually unfettered right to the attendance at trial of his relatives, is overstated. For example, in *Woods v. Kuhlmann*, 977 F.2d 74 (2d Cir. 1992), the Second Circuit upheld the exclusion of all of the defendant's relatives during the testimony of a witness, even though only one member of the family had threatened the witness. The Second Circuit accepted the supposition of the trial court, unsupported by any evidence (although supported by common sense), that if any family members remained, they might aid the threatening family member. *Id.* at 75, 77. In *Carson v. Fischer*, 421 F.3d 83 (2d Cir. 2005), the Second Circuit held that although the exclusion of the defendant's former mother-in-law (whom the Second Circuit considered to be a family member) did not comport with *Waller*, the exclusion was too "trivial" to implicate the defendant's Sixth Amendment rights, since other family members attended the trial. *Id.* at 91-94.

And in *Sevencan v. Herbert*, 316 F.3d 76 (2d Cir. 2002), the Second Circuit originally held that a state trial court's decision to exclude the defendant's family, along with the general public, from a criminal trial would not be an unreasonable application of Supreme Court precedent, so long as the trial court, prior to conducting its *Waller* analysis, was made aware that there were members of the defendant's family whom he desired to have in attendance at the trial and the court otherwise reasonably applied the general requirements of *Waller*. *Id.* at 86. That holding was deleted when the opinion was

subsequently amended (*see Sevencan v. Herbert*, 342 F.3d 69, 75 n.3 [2d Cir. 2003], *cert. denied*, 540 U.S. 1197 [2004]); but the fact that for a time the Second Circuit had a position not dissimilar to the position advanced by the State in this Court—at least with regard to the application of the deferential standard of review of 28 U.S.C. § 2254(d)(1) to the constitutionality of the closure of the courtroom to the defendant's relatives—surely demonstrates that the parameters of the right of a defendant to have his relatives attend his trial are neither obvious nor settled.

Finally, it is noteworthy that the Second Circuit itself regarded it as a "close question" whether the district court in this case had properly relied on the Second Circuit's amended decision in *Sevencan* (342 F.3d 69), which had upheld the exclusion of a family member (App. at 12a). 439 F.3d at 75. The hairsplitting distinction that the Second Circuit drew between the evidence of likelihood of encounter in *Sevencan* and this case (App. at 12a-13a), 439 F.3d at 75, further shows why the decision of the state courts in this case should have been upheld as a reasonable application of *Waller*.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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